



economic strength
quality of life
shared responsibility

it works for us all

flexible & fair
competitive
productive

**your guide to the
employment standards act**

esa

employment standards act

Note

This guide provides general information about the Employment Standards Act, 2000 (ESA) and the Regulations. For further information and exact wording, please refer to the ESA and regulations.

A Policy Interpretation Manual will also be available for those who wish to have more detailed information about implementation of the ESA.

This guide uses examples to help provide a better understanding of the ESA. All personal and business names, characters, places and incidents used in these examples are fictitious.

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Introduction

it works for us all: the employment standards act

The *Employment Standards Act, 2000 (ESA)*, works for everyone. This is a flexible, modern law – one that helps employees to get fair treatment, employers to become more productive, and Ontario to attract more jobs, investment and stimulate economic growth.

The *ESA* provides the minimum standards for working in this province. It sets out the rights and responsibilities of employees and employers in Ontario workplaces.

about your guide to the *ESA*

This guide is a convenient source of information about key sections of the *ESA*. It is for your information and assistance only. It isn't a legal document. If you need details or exact language, please refer to the *ESA* itself and the regulations.

Information about how to obtain the *ESA* and the regulations, as well as other materials, can be found at the end of this guide.

what is covered by the *ESA*?

The *ESA* covers a wide range of employment standards, including minimum requirements for workplaces. It includes provisions to assist employees with family responsibilities, increases flexibility in work arrangements and provides mechanisms for compliance and enforcement.

The wide range of subjects covered under the *ESA* includes:



- Posting Requirements;
- Hours of Work;
- Eating Periods;
- Rest Periods;
- Wages and Overtime;
- Minimum Wage;
- Pregnancy and Parental Leave;
- Emergency Leave;
- Public Holidays;
- Vacation;
- Termination and Severance of Employment;
- Temporary Layoffs;
- Equal Pay for Equal Work;
- Homeworkers; and
- Enforcement and Compliance.

who is covered by the *ESA*?

The *ESA*, or parts of it, apply to most employers and employees in Ontario. Certain employees are covered by the *ESA*, but are exempt from (that is, not covered by) some parts of the *ESA*. Or they are covered by the *ESA*, but subject to special rules.

The chart "Industry/Occupation Exemptions and Special Rules" on page 3 sets out these exemptions and special rules.



who isn't covered by the *ESA*?

Some employees and employers in Ontario aren't covered by the *ESA*. These include:

- Employees and employers in sectors that fall under federal jurisdiction. This includes workplaces such as airlines, banks, the federal civil service, post offices, radio and television stations and railways.
- Individuals performing work in a work experience program authorized by a school board, college of applied arts and technology, or university.
- People who do community participation under the *Ontario Works Act, 1997*.
- Police officers (except for the Lie Detectors provisions which do apply).
- Inmates taking part in work programs, or people who perform work as part of a sentence or order of a court.
- People who hold political, judicial, religious or trade union offices.
- Employees of the Crown are excluded from some (but not all) provisions of the *ESA*.

There are other exemptions set out in the *ESA* and in the regulations. Check the *ESA* and the regulations for a complete listing. The regulations also set out exemptions, special rules and details about how to apply certain sections of the *ESA*.

other workplace-related laws

The *ESA* contains only some of the rules affecting work in Ontario. Other provincial and federal legislation governs issues such as workplace health and safety, human rights and labour relations. Related Ontario laws include the *Occupational Health and Safety Act*, the *Workplace Safety and Insurance Act, 1997*, the *Labour Relations Act, 1995*, the *Pay Equity Act* and the *Human Rights Code*. For more information about other Ontario laws, call the Government Citizens' Inquiry Bureau at (416) 326-1234 in Toronto, and toll-free in the rest of Ontario at 1-800-267-8097.

Federal laws affecting workplaces include statutes on income tax, employment insurance and the *Canada Pension Plan*. For more information about federal laws, call the Government of Canada information line at 1-800-622-6232.

Chart: "Industry/Occupation Exemptions and Special Rules"

Industry/Occupation Exemptions and Special Rules

Symbols mean employees are:

- - covered
- - not covered
- ◐ - special rules apply

job categories	Minimum Wage	Hours of Work	Daily Rest Periods	Weekly/Bi-weekly Rest Periods	Eating Periods	Overtime Pay	Paid Public Holidays	Vacation with Pay	Pregnancy, Parental and Emergency Leave	Termination Notice/Pay	Severance Pay
Ambulance drivers, helpers and first aid attendants on an ambulance	●	●	●	●	●	○	●	●	●	●	●
Construction employees (on-site and related off-site)	●	○	○	○	●	◐	◐	●	●	○	○
Overtime pay 1½ X regular rate for each hour in a work week in excess of											
Road building: streets, highways and parking lots (on-site) excluding on-site road maintenance											
- 55 hours, with limited averaging over two successive weeks											
Road building: bridges, tunnels, retaining walls in connection with streets or highways (on-site employees)											
- 50 hours with limited averaging over two successive weeks											
Sewers, watermain and incidental work, including guarding the site											
- 50 hours											
Public Holidays Exempted if receiving at least 7.3 per cent of wages for vacation pay or public holiday pay.											
Construction employees: Road maintenance (on-site)	●	○	○	○	●	◐	◐	●	●	○	○
Overtime Pay: 55 hours, with limited averaging over two successive weeks											
Public Holidays Exempted if receiving at least 7.3 per cent of wages for vacation pay or public holiday pay.											
Termination notice/pay and severance pay: Entitled to notice of termination. Exempted from severance pay.											
Continuous operation employees (e.g. oil refineries, steel works, breweries)	●	●	●	●	●	●	◐	●	●	●	●
Public Holidays: In some cases, may be required to work on a public holiday - see the Public Holidays section of this guide or the Public Holidays Fact Sheet.											
Crown employees	○	○	○	○	○	○	○	○	●	●	●
Domestic workers employed by a householder	◐	●	●	●	●	●	●	●	●	●	●
Provides services in the household or care, supervision or personal assistance to children, senior or disabled members of the household.											
Does not include a sitter who provides care, supervision or personal assistance to children on an occasional, short-term basis.											
(Also see Homemakers)											
Minimum Wage: No deductions for non private room.											
For a list of permitted deductions see the Minimum Wage section of this guide or the Minimum Wage Fact Sheet.											
Drivers and drivers' helpers on a 'for hire' delivery vehicle for local cartage	●	●	●	●	●	◐	●	●	●	●	●
Overtime pay: 1½ X regular rate for each hour in excess of 50 in a work week.											

Industry/Occupation Exemptions and Special Rules

Symbols mean employees are:

- - covered
- - **not** covered
- ◐ - special rules apply

job categories

Drivers of highway transport trucks 'for hire'
operated by holders of *Truck Transportation Act*
operating licenses.

Overtime pay: 1½ X regular rate for each hour in excess of 60 in a work week; based only on hours driver is directly responsible for truck.

Elect to work employees may choose to work when requested and may refuse work without penalty.

Public Holidays: General standard does not apply, but entitled to 1½ X regular rate for hours worked on the holiday

Embalmers and Funeral Directors

Farm employees who are directly employed in primary production of eggs, milk, grain, seeds, fruit, vegetables, maple products, honey, tobacco, herbs, pigs, cattle, sheep, goats, poultry, deer, elk, ratites, bison, rabbits, game birds, wild boar and cultured fish.

(Also see: Harvester, 'Near Farming', Landscape gardeners)

'Near farming'. Workers directly employed in mushroom growing; growing of flowers, trees and shrubs for the retail and wholesale trade; growing, transporting and laying of sod; breeding and boarding of horses on a farm; or the keeping of fur-bearing mammals under the *Fish and Wildlife Conservation Act, 1997* for propagation or commercial production of pelts.

(Also see: Farm employees, Harvesters, Landscape gardeners)

Firefighters

Fishers (commercial)

Fresh fruit, vegetable canning, processing and packing or distribution: employees with the employer not more than 16 weeks.

Overtime pay: 1½ X regular rate for hours in excess of 50 in a work week.

Harvesters of fruit, vegetables and tobacco

(Also see: Farm employees, 'Near Farming', Landscape gardeners)

Minimum Wage: Piece work rates and deductions

Paid Public Holidays: Standard applies after 13 weeks or more with an employer. In some cases, may be required to work on a public holiday – see the Public Holidays section of this guide or the Public Holidays Fact Sheet (Continuous Operations).

Vacation with Pay: Standard applies after 13 weeks or more with an employer.

	Minimum Wage	Hours of Work	Daily Rest Periods	Weekly/Bi-weekly Rest Periods	Eating Periods	Overtime Pay	Paid Public Holidays	Vacation with Pay	Pregnancy, Parental and Emergency Leave	Termination Notice/Pay, Severance Pay
parts of the law	●	●	●	●	●	◐	●	●	●	●
	●	●	●	●	●	●	◐	●	●	○
	●	○	○	○	●	●	●	●	●	●
	○	○	○	○	○	○	○	○	●	●
	●	○	○	○	○	○	○	●	●	●
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	○	○	○	○	○	○	○	○	●	●
	●	●	●	●	●	◐	●	●	●	●
	◐	○	○	○	○	○	◐	◐	●	●

Industry/Occupation Exemptions and Special Rules

Symbols mean employees are:

- – covered
- – not covered
- ◐ – special rules apply

job categories

Homemakers employed by a third party, such as an agency, to perform domestic services for a householder and/or family in their private residence.

Minimum Wage: Employer not required to pay more than 12 hours/day at (at least) minimum wage.

Homeworkers (employees who do work such as: word processing, telephone soliciting, online research, sewing, manufacturing, or preparing food for resale in their own home for an employer)

Minimum Wage: 110 per cent of general minimum wage.

Hospital employees

Public Holidays: In some cases, may be required to work on a public holiday – see the Public Holidays section of this guide or the Public Holidays Fact Sheet.

(See also: Elect to work)

Hotel, motel, tourist resort, restaurant or tavern employees

Public Holidays: In some cases, may be required to work on a public holiday – see the Public Holidays section of this guide or the Public Holidays Fact Sheet.

Hotel, motel, tourist resort, restaurant or tavern employees who are provided with room and board and who work more than 16 and not more than 24 weeks per year.

Overtime pay: 1½ X regular rate for each hour in excess of 50 in a work week.

Public Holidays: In some cases, may be required to work on a public holiday – see Guide or Public Holiday Fact Sheet.

Hotel, motel, tourist resort, restaurant or tavern employees who are provided with room and board and who work 16 weeks or less per year.

Overtime pay: 1½ X regular rate for each hour in excess of 50 in a work week.

Hunting and fishing guides

Minimum Wage: For less than five consecutive hours/day: \$34.25. For five or more hours/day: \$68.50.

Information technology professionals who use specialized knowledge and professional judgment to work with information systems based on computers and related technologies.

Landscape gardeners

Liquor servers

Minimum Wage: (special rate) \$5.95/hour. does not include tips and gratuities.

Public Holidays and Overtime Pay: exemption and/or special rules may apply – see Hotel, motel etc.

Minimum Wage	Hours of Work	Daily Rest Periods	Weekly/Bi-weekly Rest Periods	Eating Periods	Overtime Pay	Paid Public Holidays	Vacation with Pay	Pregnancy, Parental and Emergency Leave	Termination Notice Pay, Severance Pay
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Industry/Occupation Exemptions and Special Rules

Symbols mean employees are:

- ☒ – covered
- ☐ – not covered
- ☐ – special rules apply

job categories

Maintenance employees working on site on buildings, structures, sewers, pipelines, mains, tunnels or other works except roads.

Termination Notice/Pay, Severance Pay: Exempted from severance pay

Managerial and supervisory employees

Part-time employees unless employed in an exempted industry or occupational group.

Professionals

Employees who are:

- qualified and practice as architects, lawyers, professional engineers, public accountants, surveyors, veterinarians,
- registered practitioners of chiropody (including podiatry), chiropractic, dentistry, massage therapy, medicine, optometry, pharmacy, physiotherapy or psychology,
- registered drugless practitioners under the *Drugless Practitioners' Act* (i.e. naturopaths, osteopaths),
- teachers, as defined in the *Teaching Profession Act*; and
- students training for these professions.

Emergency Leave may not be taken where it would constitute an act of professional misconduct or a dereliction of professional duty.

Professionals – registered practitioners under Schedule 1 of the *Regulated Health Professions Act, 1991*, excluding those listed above:

Audiologists, dental hygienists, dental technologists, denturists, dieticians, medical laboratory technologists, medical radiation technologists, midwives, nurses, occupational therapists, opticians, respiratory therapists and speech language therapists.

Emergency Leave may not be taken where it would constitute an act of professional misconduct or a dereliction of professional duty.

(See also: Hospitals)

Registered real estate salespersons working for a registered broker.

Minimum Wage Hours of Work Daily Rest Periods Weekly/Bi-weekly Rest Periods Eating Periods Overtime Pay Paid Public Holidays Vacation with Pay Pregnancy, Parental and Emergency Leave Termination Notice/Pay, Severance Pay

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Industry/Occupation Exemptions and Special Rules

Symbols mean employees are:

- ☒ covered
- ☐ not covered
- ☐ special rules apply

job categories

Residential care workers who educate, care for or supervise developmentally handicapped persons in a residence and live in the residence when working.

Minimum Wage: Employer not required to pay more than 12 hours daily at (at least) minimum wage and up to three hours more if hours are recorded by employee.

Free time: 36 hours per work week, which are to be consecutive unless the employee consents to another arrangement. If an employee consents to work during free time, wages are calculated at 1½ X the regular rate for time worked or time in lieu may be added to one of next eight free time periods.

Salespersons – commission who sell away from their employer's office or plant (except those who sell on a route).

Salespersons – commission in automobile sector

Minimum Wage: Maximum pay period of one month. Reconciliation periods set for advances on wages are:

- Jan. 1 – Mar. 31
- April 1 – June 30
- July 1 – Sept. 30
- Oct. 1 – Dec. 31

Students under 18 who:

- Work 28 hours or less a week during the school term or
- Work during school holidays.

Minimum Wage: (special rate) \$6.40/hour.

Students employed:

- to instruct or supervise children, or
- at a camp for children, or
- directly in a recreation program operated by a charitable organization.

Superintendents, janitors and caretakers of a residential building who reside in the building.

Swimming pools: Persons employed to install and maintain swimming pools.

Taxicab drivers

	Minimum Wage	Hours of Work	Daily Rest Periods	Weekly/Bi-weekly Rest Periods	Eating Periods	Overtime Pay	Paid Public Holidays	Vacation with Pay	Pregnancy, Parental and Emergency Leave	Termination Notice Pay	Severance Pay
Residential care workers	☒	☐	☐	☒	☐	☐	☒	☒	☒	☒	☒
Salespersons – commission	☐	☐	☐	☐	☐	☐	☐	☐	☒	☒	☒
Salespersons – commission in automobile sector	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒
Students	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒
Students employed:	☐	☒	☒	☒	☒	☐	☐	☒	☒	☒	☒
Superintendents, janitors and caretakers	☐	☐	☐	☐	☒	☐	☐	☒	☒	☒	☒
Swimming pools:	☒	☐	☒	☒	☒	☐	☐	☒	☒	☒	☒
Taxicab drivers	☒	☒	☒	☒	☒	☐	☐	☒	☒	☒	☒

parts of the law

Posting Information: Rights and Obligations

To help ensure that employers understand their obligations and employees know their rights, the Ministry of Labour has prepared a poster. All employers covered by the *ESA* in the province (excluding the Crown) *must* display this poster in the workplace where it's likely to be seen by employees.

The poster, titled "What You Should Know About the Ontario *Employment Standards Act*," contains a brief summary of some of the important parts of the *ESA*, including:

- hours of work;
- overtime pay;
- minimum wage;
- public holidays;
- vacation with pay;
- leaves of absence from work;
- termination and severance of employment;
- payroll records;
- reprisals; and
- enforcement.

If the majority language of a workplace is other than English, the employer *must* contact the Ministry of Labour to see whether the ministry has prepared a translation of the poster into that language. If so, the employer is required to post a copy of the translation next to the English version of the poster.

An employer who fails to meet these posting requirements may be fined and/or prosecuted by the ministry.

Copies of the poster can be obtained through:



- Ministry of Labour website, <http://www.gov.on.ca/lab/main.htm>
- Ministry of Labour Publications Sales unit, 1-800-809-4731;
- Publications Ontario, 1-800-668-9938; and
- Ministry of Labour District Offices.

Record Keeping

All employers in Ontario are required to keep written records about each person they hire.

These records must be kept by the employer, or by someone else on behalf of the employer, for a certain period of time. The employer must also ensure that the records are readily available for inspection.

contents of employee records

Each employee's written record must contain several pieces of information.

The Employee's Name, Address and Starting Date of Employment

This must be kept for three years after the employee stopped working for the employer.

The Employee's Date of Birth if the Employee is a Student under 18

This must be kept either three years after the employee's 18th birthday or three years after the employee stopped working for the employer, whichever happens first.

The Hours Worked by the Employee Each Day and Week

This must be kept for three years after the day or week of work.

If an employee receives a fixed salary for each pay period and the salary doesn't change (except if the employee works overtime) the employer is only required to record:

- the employee's hours in excess of those hours in the employee's regular work week;
- AND**
- the number of hours in excess of eight per day (or in excess of the hours in the employee's regular work day, if it's more than eight hours).

Employers aren't required to record the hours of work for employees who are *exempt* from overtime pay and the provisions for maximum hours of work.

All the Vacation Time Taken by the Employee

This must be kept for three years after the vacation time was taken.

The Information Contained in an Employee's Wage and Vacation Pay Statements

This must be kept for three years after the information was given to the employee.

All the Documents Relating to an Employee's Pregnancy, Parental or Emergency Leave

These must be kept for three years after the day the leave expired.

Homeworker Register

Employers who employ "homeworkers" are also required to keep a register containing the name, address and wage rate of the homeworker. This must be kept for three years after the homeworker stopped working for the employer.

Payment of Wages

Employers must establish a regular pay period *and* a regular pay day for employees.

An employer has to pay all the wages earned in each pay period, other than vacation pay that is accruing (accumulating), no later than the employee's regular pay day for the period.

Some employees earn commissions or "bonuses" based on sales made in a pay period. In these situations, the employment contract or the practice of the employer often provides that the commission or bonus isn't "due and owing" or "earned" until some future event has occurred. For example, this could be when goods or services have been delivered to the customer and full payment has been received.

In such cases, the commission or bonus isn't "earned" in the pay period in which the sales are actually made. Instead, in accordance with the employer's accepted or agreed-on practice, it's "earned" and paid at a later date.

There are special rules about when employees must be paid their vacation pay. (See "Vacation" for further information.)

how wages and vacation pay are paid

An employer may pay wages – including vacation pay – by:

- cash;
- cheque; or
- direct deposit into the employee's account at a bank or other financial institution.

If payment is by cash or cheque, the employee must be paid the wages at the workplace or at some other place agreed to *in writing* by the employee.

If the wages are paid by direct deposit, the employee's account must be in his or her name. Nobody other than the employee can have access to the account unless the employee has authorized it. The branch or facility of the employee's financial institution must be within a reasonable distance from where the employee usually works, unless the employee agrees otherwise *in writing*.

When Employment Ends

If an employee stops working, the employer must pay his or her outstanding wages, including vacation pay (plus any payments due to the employee because the employment has ended):

- no later than seven days after the employment ends;
- OR**
- on what would ordinarily have been the employee's next regular pay day; whichever is later.

(For information about any payments that an employee may be owed because employment has ended, see "Termination of Employment".)

wage statements

On or before an employee's pay day, the employer must provide the employee with a wage statement which sets out:

- the pay period for which the wages are being paid;
- the wage rate, if there is one;

- the gross amount of wages and – *unless* the employee is given the information in some other manner (such as in an employment contract) – how the gross wages were calculated;
- the amount of vacation pay (*see the following section for details*);
- the amount and purpose of each deduction;
- any amounts that were paid in respect of room or board; and
- the net amount of wages.

The wage statement must be:

- in writing;

OR

- provided by e-mail if the employee has access to some means of making a paper copy.

The employee must be able to keep this information separate from his or her cheque.

vacation pay statements

If an employee takes vacation days during a pay period, the employer must include the following information on the wage statement:

- vacation pay that has accrued but is unpaid to the employee from previous calendar years;
- vacation pay that has accrued in the current calendar year;
- vacation pay that is being paid; and
- the total vacation pay that has accrued but hasn't been paid.

However, if an employee is paid vacation pay on *each paycheque* as it accrues, the employer has two options:

- to provide a wage statement that clearly shows the amount of vacation pay being paid separately from other wages;

OR

- to provide a separate vacation pay statement containing the following information:
 - vacation pay that has accrued but is unpaid to the employee from previous calendar years;
 - vacation pay that has accrued in the current calendar year;
 - vacation pay that is being paid; and
 - the total vacation pay that has accrued but hasn't been paid.

deductions from wages and vacation pay

Only three kinds of deductions can be made from an employee's wages or vacation pay.

Statutory Deductions

Federal and provincial statutes sometimes require an employer to withhold or make deductions from an employee's wages. For example, employers are required to make deductions for income taxes, employment insurance premiums and Canada Pension Plan contributions.

An employer isn't permitted to deduct more than the law says and can't make deductions if the money isn't remitted to the proper authority.

Court Ordered

A court order may say that an employee owes money either to the employer or to someone else other than his or her employer, and that the employer can make a deduction from the employee's wages.

If a court determines that an employee owes the employer money, the court order doesn't have to specifically allow the employer to deduct the debt from the employee's wages. The employer can make the deduction.

However, suppose an employee owes money to someone else other than his or her employer. In this case, the employer may receive a court order directing it to make a deduction and send the money to the third party. The employer isn't allowed to make this deduction if the money isn't properly sent on to the third party.

The *Wages Act* also limits how much the employer is allowed to deduct at any one time. (Contact the Ontario Ministry of the Attorney General for more information about the *Wages Act*.)

Written Authorization

An employer may also deduct money from an employee's wages if the employee has signed a *written statement* authorizing the deduction. This is called a "written authorization."

An employee's written authorization must state that a deduction from wages is allowed. The authorization must also:

- specify the amount of money to be deducted;
- OR**
- provide a method of calculating the specific amount of money to be deducted.

A general statement or "blanket authorization" that an employee owes money to the employer under certain circumstances isn't sufficient to allow a deduction from wages. An employee's verbal authorization to make deductions is also not valid.

Even with a signed authorization, an employer *can't* make a deduction from wages if:

- it is supposed to cover a loss due to "faulty work."
For example, "faulty work" could be a mistake in a credit card transaction, work that is spoiled or rejected, or a situation where tools are broken or company vehicles damaged;
- OR**
- the employer has a cash shortage or has had property lost or stolen when an employee didn't have sole access and total control over cash or property that is lost or stolen. A deduction can only be made when the employee was the *only one* to have access to the cash or property, and has provided a written authorization to the employer to make the deduction.

Minimum Wage

The minimum wage is the lowest hourly wage an employer can pay employees. Some employees have jobs that are exempt from the minimum wage provisions of the *ESA*. (See "Industry/Occupation Exemptions and Special Rules" for information on these job categories.)

minimum wage rates

There is a general minimum wage rate that applies to most employees. However, other rates apply to the following employees – see *Ontario's Minimum Wage Regulations*, later in this chapter, for specific rates.

Employees Who Regularly Serve Liquor

A lower hourly rate applies to employees who serve liquor directly to customers in licensed premises as a regular part of their work. "Licensed premises" are the part of a place that has a *Liquor Licence Act* permit.

Students under 18

A lower hourly rate applies to some students who are under 18. They must be paid at least the student minimum wage if:

- they are full-time students and work 28 hours a week or less when school is in session; or
- they are full-time students and work during a school holiday (for example, March break, Christmas break, summer holidays).

Full-time students who work more than 28 hours a week when school is in session are entitled to the general minimum wage.

Hunting or Fishing Guides

Hunting or fishing guides are paid for blocks of time instead of by the hour. They get a minimum amount for working less than five consecutive hours, and a different minimum amount for working five hours or more in a day – whether or not the hours were consecutive.

Homeworkers

Homeworkers, including students under 18 who are homeworkers, are entitled to a premium wage rate of 110 per cent of the general minimum wage rate.

deemed amount for room and board

An employee's gross pay before any deductions are taken off (for such things as Canada Pension Plan (CPP), Employment Insurance (EI) and income tax) must add up to at least the minimum wage for all hours worked. However, the *ESA* and regulations provide that certain amounts are deemed to have been paid if the employer provides the employee with room or board or both. The amounts that an employer is deemed to have paid for room or board or both are set out at the end of this chapter.

For example, if the minimum wage is \$6.85 an hour and an employee works 40 hours a week, his or her gross pay (before any deductions are made) must be at least \$274.00 a week. If the employee is provided with room and board for the week, the employer is deemed to have paid the employee \$85.25. The employer must therefore pay (before making any deductions for such things as CPP, EI or income tax) the difference between the minimum wage for all hours worked and the amount deemed to have been paid for room and/or board.

Here's an example:

Naomi's employer provides her with a private room and three meals a day. Naomi works 40 hours a week at the minimum wage of \$6.85 an hour.

Naomi is entitled to a minimum of \$6.85 an hour X 40 hours = \$274.00

The employer is deemed to have paid (for room and board) -85.25

The employer must pay Naomi
(before deductions for such things as CPP, EI and taxes) \$188.75

The amount for room or board or both is deemed to have been paid only if the employee receives the meals and occupies the room. For example, if an employee is away on vacation for two weeks and not eating the meals or occupying the room provided by the employer, the employer won't be credited with having paid to the employee the amounts for room and board for those two weeks.

three-hour rule

If an employee is called in to work, but is sent home after working less than three hours, he or she must be paid whichever of the following pays the most:

- three hours at the minimum wage;
- OR**
- the employee's regular wage for the time worked.



This is sometimes called the "three-hour rule."

The rule doesn't apply to:

- students (including students over 18); or
- employees whose regular shift is three hours or less.

harvest employees

Employees who harvest fruit, vegetables or tobacco get the general minimum wage. Note that some harvest employees are paid by the amount of work they do, not the number of hours they work. This is called "piece work."

Employees are entitled to be paid a piece-work rate that's generally recognized in the area as being set so that an employee exercising reasonable effort would earn at least the minimum wage for the hours worked. For further information, contact the Ontario Ministry of Labour.

commission salespeople

If an employee's pay is based completely or partly on commission, it must amount to at least the minimum wage for each hour the employee has worked. (Special rules may apply to some salespeople on commission. See "Industry/Occupation Exemptions and Special Rules" for more information.)

To ensure an employee is receiving the minimum wage, the total amount the employee earned over a work week is divided by the number of hours the employee worked in that week.

Here's an example:

Calculating pay

Luba's pay over a work week was \$150.00. During this week, she worked a total of 25 hours:

- $\$150.00 \div 25 = \$6.00$

If the minimum wage is \$6.85 an hour, then 25 hours at \$6.85 is \$171.25. Therefore, Luba is owed the difference between her commission pay (\$150.00) and what her employer would have paid for the same number of hours at the minimum wage (\$171.25):

- $\$171.25 - \$150.00 = \$21.25$

Luba's employer owes her \$21.25.

ontario's minimum wage regulations

These are the minimum hourly wage rates:

• General workers (includes domestic and harvest workers)	\$6.85
• Homeworkers	\$7.54
• Students under 18	\$6.40
• Liquor servers	\$5.95
• Hunting and fishing guides, minimum daily rate:	
– for five hours or more a day	\$68.50
– for less than five hours	\$34.25

These are the maximum room and meal allowances that can be used to calculate the minimum wage rate for *general workers*:

• Room (weekly) –	
– private	\$31.70
– non-private or shared	\$15.85
• Meals –	
– each meal	\$2.55
– weekly maximum	\$53.55
• Rooms and meals (weekly) –	
– with private room	\$85.25
– with non-private or shared room	\$69.40
• Harvest workers (only) weekly housing –	
– serviced maximum	\$99.35
– unserviced maximum	\$73.30

The maximum room and meal allowances that can be used to calculate the minimum wage rate for *domestic* employees (see "Industry/Occupation Exemptions and Special Rules") are as follows:

- Private room (weekly)..... \$31.70
- Non-private room (weekly)..... \$0.00
- Meals –
 - each meal..... \$2.55
 - weekly maximum \$53.55
- Rooms and meals (weekly) –
 - with private room \$85.25
 - with non-private room \$53.55

The deductions for a room are only allowed if the room is furnished, supplied with clean bed linen and towels, and is reasonably accessible to washroom facilities.

Hours of Work

The maximum number of hours an employee can be required to work is:

- *eight* hours a day or the number of hours in an established regular workday – if it is longer than eight hours; and
- 48 hours a week.

The only way these maximums can be changed is by *written* agreement.

an agreement in writing

An employer and an employee can agree *in writing* that the employee will work more than:

- eight hours a day;
- his or her established regular workday – if it is longer than eight hours; or
- 48 hours a week.

They can't agree that the employee will work more than 60 hours a week unless the Director of Employment Standards, Ministry of Labour, approves the agreement.

In most cases, an employee can cancel an agreement to work more hours by giving the employer two weeks' *written* notice. An employer can cancel the agreement by giving the employee reasonable notice.

hours free from work

Employees are entitled to a certain number of hours free from having to work.

Daily

An employee must receive at least 11 consecutive hours off work each day. This applies even if:

- the employer and the employee have agreed *in writing* to a longer workday; or
- the employer has established a longer regular workday.

This rule doesn't apply to employees who are on call and are "called in" to work during a period when they wouldn't normally be working.

Between Shifts

Employees must receive at least *eight* hours off work between shifts.

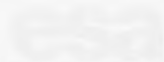
This doesn't apply if the total time worked on both shifts isn't more than 13 hours.

An employer and employee can also agree *in writing* that the employee will receive less than eight hours off work between shifts.

Here are some examples.

Back-to-back shifts

Marcus finished an eight-hour shift at 12 midnight on Sunday. His employer asks him to stay on to work the next shift. Without a *written* agreement to receive less than eight hours off between shifts, Marcus can only be required to work five hours of the next shift.



Split shifts

Mabel works in a restaurant. She is on split shifts, working from 6 a.m. to 11 a.m. and then from 2 p.m. to 7 p.m. The total time of her two shifts is 10 hours. Mabel doesn't have to have eight hours off between the split shifts, because the hours she worked do not exceed 13 hours.

Weekly or Bi-Weekly

Employees must receive at least:

- 24 consecutive hours off work in each work week; or
- 48 consecutive hours off work in every period of two consecutive work weeks.

emergencies and exceptional circumstances

In exceptional circumstances, and only so far as is necessary to avoid *serious interference* with the ordinary working of the employer's establishment or operations, can an employer *require* an employee to work:

- more than the normal limit of eight hours a day and 48 hours a week;
- more than the hours of work in his or her established regular workday; or
- during a period when the employee is free from work.

An employer can require an employee to work when:

- there's an emergency;
- something unforeseen occurs that interrupts the continued delivery of essential public services, *regardless of who delivers these services* (for example, hospital, public transit or firefighting services, even if the employee only indirectly supports these services, such as an employee of a company that is contracted to prepare and deliver patient meals to a hospital);
- something unforeseen occurs that would interrupt continuous processes;
- something unforeseen occurs that would interrupt seasonal operations (that is, operations that are limited to or dependent on specific conditions or events – such as winter ski operations); or
- it's necessary to carry out urgent repair work to the employer's plant or equipment.

Here are some examples:

- natural disasters (very extreme weather);
- major equipment failures;
- fire and floods; and
- an accident or breakdown in machinery that would prevent others in the workplace from doing their jobs (for example, the shutdown of an assembly line in a manufacturing plant).

Here are examples of situations that *don't* fall under this exception:

- when rush orders are being filled;
- during inventory taking;
- when an employee doesn't show up for work;
- when poor weather slows shipping or receiving;
- during seasonal busy periods (such as Christmas); or
- during routine or scheduled maintenance.

Eating Periods and Breaks

Employers are required to provide eating periods to employees, but they aren't required to provide other types of breaks.

eating periods

An employee must not work for more than five hours in a row without getting a 30-minute eating period (meal break) free from work. However, if the employer and employee agree, the eating period can be split into two eating periods in every five consecutive hours. Together these must total at least 30 minutes. This agreement can be verbal or in writing.

Meal breaks are unpaid unless the employee's employment contract requires payment. Even if the employer pays for meal breaks, the employee must be free from work.

Meal breaks, whether paid or unpaid, aren't considered hours of work, and aren't counted toward overtime.

coffee and other breaks

Employers don't have to give employees "coffee" breaks or any other kind of break other than meal breaks.

Employees who are required to remain at the workplace during a coffee break or other type of break must be paid for that time. If an employee is free to leave the workplace during the coffee break or other type of break, the employer doesn't have to pay for the time.



Overtime

For most employees, overtime begins after they have worked 44 hours in a work week. After that time, they must receive overtime pay.

overtime pay

Overtime pay is 1½ times the employee's regular rate of pay. (This is often called "time and a half.")

Here's an example:

Suppose an employee's regular pay is \$8.00 an hour. If the employee works more than 44 hours in a work week, his or her overtime rate is

$\$8.00 \times 1\frac{1}{2} = \$12.00$ an hour for every hour worked after 44 in each week.

exceptions

Many employees have jobs that are exempt from the overtime provisions of the ESA. Others work in jobs where the overtime threshold is more than 44 hours in a work week. (See "Industry/Occupation Exemptions and Special Rules".)

Different Kinds of Work

Some employees have jobs where they're required to do more than one kind of work. Some of the work might be specifically exempt from overtime pay, while other parts might be covered. If at least 50 per cent of the hours the employee works are in a job category that's covered, the employee qualifies for overtime pay.

Here's an example.

When an employee does two kinds of work

Gerard works for a taxi company both as a cab driver and as a dispatcher in the office. Working as a cab driver he is exempt from overtime pay, but working in the office as a dispatcher he isn't.

During a work week, Gerard worked 26 hours in the office and 24 hours driving a cab, for a total of 50 hours. This is six hours over the overtime threshold of 44 hours.

Because Gerard spent at least 50 per cent of his working hours that week as a dispatcher (a job category that's covered), he qualifies for six hours of overtime pay.

Managers and Supervisors

Managers and supervisors don't qualify for overtime if the only work they do is managerial or supervisory. Even if they perform other kinds of tasks that aren't managerial or supervisory, they don't get overtime pay if these tasks are performed only on an irregular or exceptional basis.

no overtime on a daily basis

Unless a contract of employment or a collective agreement states otherwise, an employee doesn't earn overtime pay on a daily basis by working more than a set number of hours a day. Overtime is calculated only:

- on a weekly basis;
- OR**
- over a longer period under an averaging agreement.

averaging agreements

Sometimes employees need to work variable hours to meet family responsibilities. For example, perhaps an

employee needs to take a child once a month for a day of special medical treatment, but can't afford to lose a day's pay. Instead the employee would like to work extra hours in the preceding weeks, to make up the time.

Likewise, employers may need employees to work extra hours during a peak period, in order to fulfill customer orders.

An employer and an employee can agree in writing to average the employee's hours of work over a period of up to four weeks to determine whether the employee will receive overtime pay. With the approval of the Director of Employment Standards, Ministry of Labour, employers and employees can agree to averaging agreements over periods of longer than four weeks.

With an averaging agreement, the employee's overtime entitlement isn't calculated after 44 hours each week. Instead, it's calculated after the employee has worked an average of 44 hours a week over the agreed period.

How It Works

When there is an averaging agreement, the overtime is calculated on the basis of the average number of overtime hours in each week of the averaging period – rather than the actual number of hours worked in each week.

Here is an example:

Myron and his employer agree in writing to average his hours for overtime purposes over a period of two weeks. Myron works 54 hours the first week and 36 hours the second week. He earns \$10.00 an hour and his overtime rate is \$15.00 per hour ($1\frac{1}{2} \times \$10.00$).

Myron's overtime entitlement is calculated as follows:

1. The total number of hours worked in the averaging period are added together and then divided by the number of weeks in the averaging period to get the average number of hours worked in each week of the averaging period.

$$\begin{aligned} 54 + 36 &= 90 \text{ hours} \\ 90 \text{ hours} \div 2 \text{ weeks} &= 45 \text{ hours per week} \end{aligned}$$

2. The average number of hours worked per week minus 44 hours equals the average number of overtime hours in each week of the averaging period.

$$45 \text{ hours per week} - 44 \text{ hours per week} = 1 \text{ overtime hour per week}$$

3. The overtime entitlement in week one and two of the averaging period is calculated by multiplying the average overtime hours per week by his overtime rate for that week.

$$\begin{aligned} \text{Week 1: } 1 \text{ hour} \times \$15.00 \text{ per hour} &= \$15.00 \\ \text{Week 2: } 1 \text{ hour} \times \$15.00 \text{ per hour} &= \$15.00 \end{aligned}$$

Averaging agreements must specifically state that the hours of work are being averaged for the purpose of determining any overtime entitlement.

When an employer and an employee have a written agreement to average the hours of work, the agreement must have an expiry date to be valid. If the employees are non-unionized, the expiry date can't be more than two years after the agreement comes into operation.

An averaging agreement is binding on both the employer and the employee until it expires. It can't be revoked or cancelled before the expiry date unless both the employee and the employer agree in writing.

When an averaging agreement expires, the employer and employee can decide whether to renew, change or not renew the agreement.

Approvals Issued under the Previous Act

If an averaging agreement was approved under the former Employment Standards Act, it remains in effect for a maximum of one year after the date the new *ESA* was proclaimed (September 4, 2001) unless the employees are represented by a union and a collective agreement applies to them. In that case, the averaging agreement approved under the former act is valid until a new collective agreement comes into operation. If a new collective agreement doesn't come into operation within one year after the existing collective agreement has expired, the averaging agreement expires at the end of that year.

agreements for paid time off instead of overtime pay

An employee and an employer can agree in writing that the employee will receive paid time off work instead of overtime pay. This is sometimes called "banked" time or "time off in lieu."

If an employee has agreed to bank overtime hours, he or she must be given 1½ hours of paid time off work for each hour of overtime worked.

Paid time off must be taken within three months of the week in which the overtime was earned or, if the employee agrees in writing, it can be taken within 12 months.

If an employee's job ends before he or she has taken the paid time off, the employee must receive overtime pay. This must be paid no later than seven days after the date the employment ended or on what would have been the employee's next pay day.

payment for working on a public holiday

Suppose an employee works on a public holiday and receives premium pay for hours he or she worked on that day. In this case, the hours the employee is paid at the premium rate aren't counted toward hours of work when the overtime is calculated. (See "Public Holidays," for details about receiving premium pay on public holidays.)

calculating overtime pay

Here are several examples of how overtime pay is calculated:

Hourly Paid Employees

The following examples show how to calculate overtime pay when an employee is paid on an hourly basis.

When an employee works overtime in a normal work week

Ravi's regular pay is \$7.00 an hour. His overtime rate (1½ X regular hourly pay) is \$10.50 an hour. This week Ravi worked the following hours:

Day	Hours Worked
Sunday	0
Monday	8
Tuesday	12
Wednesday	9
Thursday	8
Friday	0
Saturday	8
Total hours:	53

Any hours worked over 44 in a week are overtime hours. Ravi worked nine hours of overtime ($53 - 44 = 9$).

Ravi's pay for the week is calculated as follows:

Regular pay:	44 X \$7.00	=	\$308.00
Overtime pay:	9 X \$10.50	=	94.50
Total pay:			\$402.50

When an employee's work week includes a public holiday

John's regular pay is \$7.00 an hour. John worked overtime on a week with a public holiday, but he didn't work on the holiday. His public holiday pay for the holiday is \$56.00. This week John worked the following hours:

Day	Hours Worked
Sunday	0
Monday (public holiday)	0
Tuesday	12
Wednesday	9
Thursday	8
Friday	8
Saturday	8
Total hours:	45

John worked one hour of overtime ($45 - 44 = 1$).

John's pay for the week is calculated as follows:

Regular pay:	44 X \$7.00	=	\$308.00
Overtime pay:	1 X \$10.50	=	10.50
Public holiday pay:			56.00
Total pay:			\$374.50

When an employee works on a public holiday and gets premium pay

Marylin's regular hourly pay is \$10.00. Marylin and her employer agreed in writing that:

she would work on the public holiday; and
she would be paid premium pay for the hours she worked on the holiday plus public holiday pay.

During the week of the public holiday, Marylin worked the following hours:

Day	Hours Worked
Sunday	0
Monday	9
Tuesday	9
Wednesday	9
Thursday (public holiday)	9
Friday	9
Saturday	9
Total hours:	54

Since Marilyn received premium pay for working nine hours on the public holiday, these hours aren't included when the overtime pay is calculated:

54 hours – 9 hours at premium pay = 45 hours = 1 hour of overtime pay

Marilyn's pay for the week is calculated as follows:

Regular pay:	44 X \$10.00	=	\$440.00
Overtime pay:	1 X \$15.00	=	15.00
Premium pay:	9 X \$15.00	=	135.00
Public holiday pay:			90.00
Total pay:			\$680.00

When an employee works on a public holiday and gets a substitute day off

Kathleen's regular hourly pay is \$9.00. Kathleen and her employer agreed in writing that:

she would work on the public holiday; and

she would receive a substitute day off work with public holiday pay plus her regular rate for hours worked on the public holiday (rather than be paid public holiday pay plus premium pay for the hours she worked on the holiday).

During the week of the public holiday, Kathleen worked the following hours:

Day	Hours Worked
Sunday	0
Monday	9
Tuesday	9
Wednesday	8
Thursday	9
Friday (public holiday)	9
Saturday	6
Total hours:	50

Since Kathleen agreed not to receive premium pay for the nine hours she worked on the public holiday, these hours are counted when the overtime pay is calculated:

50 hours – 44 hours = 6 hours of overtime

Kathleen's pay for the week is calculated as follows:

Regular pay:	44 X \$9.00	=	\$396.00
Overtime pay:	6 X \$13.50	=	81.00
Total pay:			\$477.00

Kathleen will also get a substitute day off work with public holiday pay within three months of the public holiday.

Employees on a Fixed Salary

If an employee's hours of work change from day to day, but his or her weekly pay stays the same, the employee is paid a fixed salary. For example, suppose an employee works 44 hours one week and 42 hours the next, but receives the same pay each week. That employee is on a fixed salary.

A fixed salary compensates an employee for all non-overtime hours up to and including 44 hours a week. After 44 hours, the employee is entitled to overtime pay.

Here's an example:

When the salary is fixed

Sharon's salary is \$500.00 a week. She worked 50 hours this work week.



1. First Sharon's regular (non-overtime) hourly rate of pay is calculated:
 $\$500.00 \div 44 = \$11.36$
Sharon was paid a regular rate of \$11.36 for each hour she worked up to and including 44 hours.
2. Next her overtime rate is calculated:
 $\$11.36 \text{ regular rate} \times 1\frac{1}{2} = \$17.04$
Her overtime rate is \$17.04 for every hour in excess of 44.
3. Then the amount of overtime she worked is calculated:
 $50 \text{ hours} - 44 \text{ hours} = 6 \text{ hours of overtime}$
4. Her overtime pay is calculated:
 $6 \text{ hours} \times \$17.04 \text{ an hour} = \$102.24$
Sharon is entitled to \$102.24 in overtime pay.

5. Finally, Sharon's regular salary and overtime pay are added together:

Regular salary:	\$500.00
Overtime pay:	102.24
Total pay:	\$602.24

Result: Sharon is entitled to total pay of \$602.24.

Employees on a Fluctuating Salary

If an employee has set hours and a salary that's adjusted for variations in the set hours, the employee's salary fluctuates.

Here's an example:

Suppose Ben is hired on the understanding that he will be paid \$400.00 a week for a regular work week of 40 hours. His salary is adjusted for weeks in which he works either more hours or fewer hours. In this case, Ben is actually receiving a wage based on the number of hours he works.

When the salary fluctuates

Ben's salary is \$400.00 in a regular work week of 40 hours (where the salary isn't adjusted). This week, he worked 50 hours.

1. First Ben's regular (non-overtime) hourly rate of pay is calculated:
 $\$400.00 \div 40 = \$10.00$
Ben's regular rate of pay is \$10.00 an hour.
2. Next his regular (non-overtime) earnings are calculated. He is entitled to \$10.00 an hour for all hours up to and including 44 hours a week:
 $\$10.00 \text{ regular rate} \times 44 \text{ hours} = \$440.00$
Ben's regular earnings for the week are \$440.00.

3. Then his hourly overtime rate is calculated:
 $\$10.00 \text{ regular rate} \times 1\frac{1}{2} = \$15.00$
 His overtime rate is \$15.00 for every hour in excess of 44 hours.
 4. The amount of overtime Ben worked is calculated:
 $50 \text{ hours} - 44 \text{ hours} = 6 \text{ hours of overtime.}$
 5. His overtime pay is calculated:
 $6 \text{ hours} \times \$15.00 \text{ an hour} = \$90.00$
 Ben is entitled to \$90.00 in overtime pay.
 6. Finally, Ben's regular pay and overtime pay are added together:
- | | |
|-------------------|-----------------|
| Regular pay: | \$440.00 |
| Overtime pay: | 90.00 |
| Total pay: | \$530.00 |

Result: Ben is entitled to total pay of \$530.00.

When There's an Averaging Agreement

Here's an example involving an employee with an averaging agreement:

When there's a four-week averaging agreement

Connor earns \$10.00 an hour in weeks when he is working in the retail department and \$20.00 an hour when he is working on the assembly line of his employer's operation. He and his employer have agreed in writing to average his hours over four weeks for the purpose of calculating overtime. In the first two weeks of the averaging period he is working in the retail department and his overtime rate ($\$10.00 \times 1\frac{1}{2}$) is \$15.00 an hour. In the second two weeks of the averaging period he is working on the assembly line and his overtime rate ($\$20.00 \times 1\frac{1}{2}$) is \$30.00 an hour.

The maximum number of hours an employee can work in a regular work week, before being paid overtime, is 44 hours. However, since Connor has a written agreement to average his overtime over four weeks, he will qualify for overtime pay if his average hours (that is, the average hours per week during the averaging period) exceed 44 hours.

During a four-week period, Connor worked the following hours:

	Week 1	Week 2	Week 3	Week 4	
Hours worked	56	43	35	46	= 180 hours

Connor's average hours per week in the averaging period are:
 $180 \div 4 = 45 \text{ hours.}$ Connor's average overtime is 1 hour per week.

Connor's overtime entitlement is:

Week 1	\$15.00 per hour X 1 hour	= \$15.00
Week 2	\$15.00 per hour X 1 hour	= \$15.00
Week 3	\$30.00 per hour X 1 hour	= \$30.00
Week 4	\$30.00 per hour X 1 hour	= \$30.00

Total overtime pay for 4 week averaging period = \$90.00

Employees Who Are Paid Wages That Aren't Based on the Hours Worked

Some employees' wages aren't based on the number of hours they work in a week. However, these employees must be paid at least the minimum wage for all the hours they work. They are also entitled to overtime if they work more than 44 hours a week.

For example, employees who are employed on a piecework basis are paid according to the number of pieces they complete, not by the hour.

Many employees are paid commission only. These employees must be paid the minimum wage for each hour worked. They are also entitled to receive overtime pay after 44 hours in a work week.

Calculating the overtime for piecework or straight commission employees

Becka is paid on a piecework basis. Rhian earns straight commissions. They both worked 48 hours this work week and each received a total of \$480.00.

1. First the regular (non-overtime) hourly rate of pay is calculated:
 $\$480.00 \div 44 \text{ hours} = \$10.91$
Their regular hourly rate of pay is \$10.91.
2. Then the hourly overtime rate is calculated:
 $\$10.91 \text{ regular rate} \times 1\frac{1}{2} = \$16.37$
Their overtime rate is \$16.37 for every hour in excess of 44 hours.
3. Next, the amount of overtime worked is calculated:
 $48 \text{ hours} - 44 \text{ hours} = 4 \text{ hours of overtime.}$
4. The overtime pay is calculated:
 $4 \text{ hours} \times \$16.37 \text{ an hour} = \$65.48$
They are each entitled to \$65.48 in overtime pay.
5. Finally, the regular pay and overtime pay are added together:

Regular pay:	\$480.00
Overtime pay:	65.48
Total pay:	\$545.48

Result: Becka and Rhian are each entitled to total pay of \$545.48.

Someone who works in retail and earns an hourly wage plus commissions is paid based on the hours he or she worked and the number of sales made.

Calculating the overtime for hourly rate plus commission employees

Justine is paid \$10.00 an hour plus commissions. In one work week she worked 50 hours and was paid \$500.00 in hourly wages plus \$100.00 in commissions.

1. First Justine's regular rate is calculated:
 $\$500.00 + \$100.00 = \$600.00 \text{ total wages paid}$
 $\$600.00 \div 44 \text{ hours} = \$13.64 \text{ an hour}$
Justine's regular rate is \$13.64 an hour.
2. Then her overtime rate is calculated:
 $\$13.64 \text{ regular rate} \times 1\frac{1}{2} = \$20.46$
Her overtime rate is \$20.46.

3. Then her regular wages are calculated:
44 hours X \$13.64 an hour = \$600.16
Justine earned \$600.16 in regular wages.

4. Next her overtime wages are calculated:
6 hours X \$20.46 an hour = \$122.76
She earned \$122.76 in overtime wages.

5. Finally, Justine's regular wages and overtime wages are added together:

Regular wages:	\$600.16
Overtime wages:	122.76
Total pay:	\$722.92

Result: Justine was paid \$600.00 and her employer therefore owes her an additional \$122.92, for a total of \$722.92.

Some commission employees are exempt from the overtime provisions. (See "Industry/Occupation Exemptions and Special Rules".)

what can't be done

It's important to note the following:

- An employer and an employee can't agree that the employee will give up his or her right to overtime pay under the *ESA*. Any such agreement isn't allowed, and the employee is still entitled to overtime pay.
- An employer can't lower an employee's regular wage to avoid paying time and a half after 44 hours (or other overtime threshold that applies) in a work week. For example, if Josée's regular pay is \$12.00 an hour, her employer can't drop her regular rate to \$8.00 an hour and then pay her 1½ times \$8.00 for overtime hours worked.

Vacation

vacation time

After working with an employer for 12 months, an employee is entitled to receive an annual vacation. These 12 months include time the employee spends away from work because of:

layoff;
sickness or injury;
approved leaves; and
pregnancy, parental and emergency leaves.

Length of Vacation Time

Employees earn a minimum of two weeks' vacation time after every 12 months of employment.

An employee can take his or her vacation either one week at a time or both weeks together. However, if the employee asks the employer in writing, and the employer agrees in writing, the vacation can be taken in periods of less than one week. The number of single vacation days to which the employee is entitled is determined in one of two ways:

- The employer calculates the number of days in the employee's usual work week and multiplies by two;
- OR**
- if the employee doesn't have a usual work week, the employer calculates the average number of days the employee worked each week in the four months before the first day the vacation time is being taken. This number is then multiplied by two.

Here are two examples:

When an employee has a usual work week

Wynton asks his employer in writing to have his vacation time scheduled in periods of less than one week. His employer agrees in writing. Wynton regularly works five days a week. To calculate how much vacation time he is entitled to, his employer multiplies his usual work week of five days by two:

- $5 \times 2 = 10$ days

Result: Wynton is entitled to 10 vacation days for that year.

When an employee doesn't work a usual number of days each week

Chantale's employer has agreed in writing to Chantale's written request to take her vacation time in periods of less than one week. Chantale is on call, and doesn't work a usual number of days each week. Chantale would like to take her first vacation day on June 17.

1. Count the total number of days Chantale worked in the four months immediately before the first day that the vacation time is to be taken. To do this, add up the total number of days Chantale worked between February 16 and June 16, inclusive. In this example, assume that Chantale worked 49 days during that period.
2. Determine the number of weeks that are in the four-month period. To do this, count the total number of days over the four-month period and divide it by seven. In this example, there are 121 days between February 16 and June 16, inclusive.
 $121 \text{ days} \div 7 = 17.29 \text{ weeks}$

3. Find the average number of days Chantale worked per week over the last four months. To do this, divide the total number of days worked in the four-month period (the number obtained in Step 1) by the number of weeks worked in the same period (the number obtained in Step 2).
 $49 \text{ days} \div 17.29 \text{ weeks} = 2.83 \text{ days}$
4. Calculate the vacation time entitlement by multiplying the average days worked per week (the number obtained in step 3) by two.
 $2.83 \text{ days} \times 2 = 5.66 \text{ days}$

Result: Chantale is entitled to 5.66 days of vacation.

The Deadline for Taking a Vacation

The employer decides when vacation time will be taken. However, employers must schedule an employee's vacation no later than 10 months after the employee has earned it.

Here's an example:

Aidan has worked for a company for 12 months and earned two weeks' annual vacation. He must take all of it within 10 months after completing his first year of employment. His employer decides when Aidan will take his vacation, and must ensure that it has been scheduled and taken within 22 months of the date Aidan started his job.

An employee can't forego his or her vacation time without the employer's agreement and the approval of the Ministry of Labour. Such an approval wouldn't affect an employer's obligation to pay the employee vacation pay. Employees can't give up the right to vacation pay.

vacation pay

Employees must receive a minimum of four per cent of the gross "wages" (excluding vacation pay) they earned in the 12 months for which the vacation is being given.

For example, suppose Janice earned gross wages of \$16,000.00 in 12 months. She is entitled to four per cent of \$16,000.00 as vacation pay = \$640.00.

If an employee's contract or collective agreement provides a better vacation benefit than the minimum required, the employee may be entitled to a higher percentage of his or her gross earnings for vacation pay. For example, an employee might be entitled to three weeks' vacation, with six per cent of gross earnings for vacation pay.

The "wages" earned on which the vacation pay is calculated includes:

- regular earnings, including commissions;
- overtime pay;
- public holiday pay;
- termination pay; and
- allowances for room and board.

It does not include:

- vacation pay already paid;
- tips and gratuities;
- discretionary bonuses and gifts that are not related to hours of work, production or efficiency;
- expenses and travelling allowances;
- living allowances;

- contributions made by an employer to a benefit plan and payments from a benefit plan that an employee is entitled to; or
- severance pay.

When to Pay Vacation Pay

An employee must receive his or her vacation pay before taking the vacation. There are three exceptions:

1. When the vacation time is being taken in periods of less than one week. In this case, the employee must be paid vacation pay on or before the pay day for the period in which the vacation falls. For example, Alvaro is taking vacation from January 1 to January 3, and the normal pay day that covers this period is January 30. Alvaro must be given his vacation pay on or before January 30.
2. When the employee has agreed in writing that his or her vacation pay will be paid on each paycheque as it accrues (accumulates). In this case, the employee's wage statement must show clearly the amount of the vacation pay being paid. This amount must also be shown separately from any other amounts paid. The employer can also issue a separate wage statement for the vacation pay being paid.
3. If the employee agrees in writing, the employer can pay the vacation pay at any time agreed to by the employee.

vacation and public holidays

A public holiday could fall during an employee's vacation period. If the employee qualifies for the public holiday, he or she doesn't lose the right to the paid public holiday, and the day remains a vacation day for the employee.

In this case, the employee is entitled to one of the following:

- The employee can have a substitute day off work with public holiday pay. This must be taken within three months of the public holiday or, if the employee agrees in writing, within 12 months of the public holiday;
- OR**
- the employer can pay public holiday pay for that day without giving the employee a substitute day off work, if the employee agrees in writing.

Employees may agree in writing to work on a public holiday that falls while they are on vacation. (See "Public Holidays," for more details.)

vacations and leaves of absence

An employee continues to earn credits toward vacation time and, in some cases – under a contract of employment – to both vacation time and vacation pay, while on pregnancy, parental and emergency leaves of absence.

Here are two examples:

Paid vacation earned through service

Ingrid's contract of employment provides that she earns two paid vacation days for every month of service. In other words, both vacation time and vacation pay are earned through service.

Ingrid's length of service continues to accrue while she's on pregnancy and parental leave. This means she continues to earn two days of paid vacation every month during her leaves, and she's entitled to full vacation with pay after she returns to work.

Vacation time earned through service and vacation pay based on wages

Tony earns two weeks of vacation time for every 12 months he's employed. His vacation pay is calculated as four per cent of the gross wages he earned in each 12-month period.

Because his length of employment continues to accrue while he's on parental leave, Tony continues to accrue vacation time during his leave just as if he were still at work. However, he won't accrue vacation pay during the period he is on leave. This is because vacation pay is calculated as a percentage of wages earned, and he didn't earn any wages while he was on parental leave.

leaves of absence and vacation conflict

An employee who is on a pregnancy, parental or emergency leave has the right to defer taking her or his vacation entitlement until the leave of absence expires (or until some later date if the employer and employee agree). This is the case even if the employee's contract of employment states that the employee isn't allowed to defer taking vacation or restricts an employee's ability to do so.

This means that an employee who is on a leave of absence under the *ESA* won't lose any vacation time or vacation pay because he or she is on a leave. It also ensures that an employee doesn't have to choose between taking less than his or her full leave entitlement and losing some or all of his or her vacation pay or vacation time.

An employee who has the right to defer vacation until the expiry of a leave of absence may forego his or her right to take vacation time, with the agreement of the employer and the approval of the Director of Employment Standards, Ministry of Labour. However, an employee can't forego his or her right to be paid vacation pay.

when employment ends

An employee might quit or be terminated before he or she has been paid all of the vacation pay. If so, the employer must calculate the vacation pay owing to the employee and pay this either within seven days of the employment ending or on what would have been the employee's next pay day, whichever is later.

Employees earn vacation pay for every hour worked. Even if an employee works only one hour for an employer, he or she is entitled to be paid four per cent of the hour's wages as vacation pay.

How it works

Xing quit his job after working for his employer for only 10 months. He wasn't qualified yet to take an annual vacation. Xing's employer must calculate at least four per cent of the gross wages Xing earned in the 10 months he was employed. Then his employer must pay him his accrued vacation pay within seven days or on what would have been Xing's next regular pay day, whichever is later.

Public Holidays

Ontario has eight public holidays:

- New Year's Day
- Good Friday
- Victoria Day
- Canada Day
- Labour Day
- Thanksgiving Day
- Christmas Day
- Boxing Day (December 26).

Employees who qualify are entitled to take these days off work and be paid public holiday pay. Or they can agree in writing to work on the holiday and they will be paid:

- public holiday pay plus a premium rate of pay for the hours worked on the public holiday;
- OR**
- their regular rate for hours worked on the holiday, plus they will receive another day off with public holiday pay.

Some employees may be required to work on a public holiday. (See *Special Rules for Certain Industries* later in this Chapter.)

Some employers give their employees a holiday on Easter Sunday, Easter Monday, the first Monday in August or Remembrance Day. However, these days aren't public holidays under the *ESA*.

While most employees are eligible for the public holiday entitlement, some employees work in jobs that aren't covered by the public holiday provisions of the *ESA*. To determine whether a job is covered, or if special rules apply, see "Industry/Occupation Exemptions and Special Rules."

performing both covered and exempt work

Some employees perform more than one kind of work for an employer. Some of this work might be covered by the public holiday part of the *ESA*, while another kind of work might be exempt from public holiday coverage.

If an employee performs both kinds of work – exempt and covered – he or she is eligible for the public holiday entitlement if at least half of the work performed in the work week of the public holiday is work that is covered.

Here's an example:

Ari works for a taxi company as both a taxi cab driver (work that is exempt from public holiday coverage) and a dispatcher (work that is covered by the public holiday part of the *ESA*). In the work week that the public holiday fell, at least half of Ari's work was as a dispatcher. Because this work is covered by the public holiday part of the *ESA*, he is eligible for the public holiday entitlement.



qualifying for public holiday entitlements

Employees qualify for the public holiday entitlement unless they:

- fail without reasonable cause to work all of their regularly scheduled days of work before or after the public holiday (this is called the "Last and First" rule); or
- fail without reasonable cause to work their entire shift on the public holiday if they agreed to or were required to work that day.

An employee who doesn't meet either of the above criteria is entitled to be paid premium pay for every hour he or she works on the holiday.

Qualified employees can be full time, part time, permanent or on contract. They can also be students. It doesn't matter how recently they were hired, or how many days they worked before the public holiday.

How the Last and First Rule Works

The following examples show how the Last and First Rule works.

the "last and first" rule

The "regularly scheduled days of work before or after the public holiday" don't have to be the days right before and right after the holiday.

For example, an employee might not be scheduled to work the day right before or after the holiday. As long as the employee works all of his or her last regularly scheduled shift before the holiday and all of the first one after it, or provides reasonable cause for not working either of those days, he or she meets this qualifying criterion.

A typical case

Sara's regular work week runs from Monday to Thursday. A public holiday falls on a Monday, and Sara's workplace closes down for that day. If Sara works the entire shift on the Thursday before the holiday and the Tuesday after the holiday, or shows reasonable cause for failing to work either of those days, she qualifies to be paid for the holiday.

When an employee takes a day off

A public holiday falls on a Monday, and Luigi's workplace closes down for that day. Luigi regularly works Monday to Thursday. Luigi has asked his employer for permission to take off the Thursday before the public holiday because he has a personal appointment. His employer *agrees*. Luigi's regularly scheduled work day before the holiday is now considered to be on the Wednesday.

If Luigi works his entire Wednesday shift before the holiday and his entire Tuesday shift after the holiday, or has reasonable cause for not working either of those days, he qualifies for the paid public holiday.

When an employee leaves early

A public holiday falls on a Friday, and Maria's workplace is closed for the holiday. Maria normally works from 9 a.m. to 5 p.m., Monday to Friday. However, she wants to leave at 3 p.m. on the Thursday before the public holiday. The employer *agrees*. Maria's regularly scheduled shift on the Thursday before the public holiday is now considered to be from 9 a.m. to 3 p.m.

If Maria works from 9 a.m. to 3 p.m. on the Thursday and 9 a.m. to 5 p.m. on the following Monday, or shows reasonable cause for failing to do so, she is entitled to the paid public holiday.

When an employee is on vacation

Canada Day falls on July 1. George is on vacation from June 25 to July 9. If George works all of his

regularly scheduled shifts before and after his vacation – on June 24 and July 10 – or has reasonable cause for failing to do so, he will qualify for the paid public holiday.

When an employee is on a leave or layoff

Lydia is on pregnancy leave when the Canada Day holiday occurs. If Lydia works her last regularly scheduled day of work before and after her leave, or has reasonable cause for failing to do so, she will be entitled to the paid public holiday.

When there's no reasonable cause

A public holiday falls on a Monday, and Bill's workplace is closed for the holiday. Bill doesn't work on his last scheduled day before the holiday, and he fails to show reasonable cause for missing that day. He receives no pay for the holiday.

reasonable cause

An employee is generally considered to have "reasonable cause" for missing work when something beyond his or her control prevents the employee from working.

For example, illness, injury, medical emergencies, deaths or other emergencies (including emergencies related to family members) might prevent the employee from working.

It is the employee's responsibility to show that he or she had a reasonable cause for staying away from work.

key definitions

The following definitions will help in understanding the rules about public holidays.

Public Holiday Pay

The amount of public holiday pay to which an employee is entitled is:

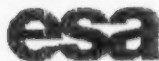
- all of the regular wages;
- **PLUS**
- all of the vacation pay

which is payable to the employee in the four work weeks ending just before the work week with the public holiday, divided by 20. If the employee has earned a *substitute* day off with public holiday pay, this calculation is done with respect to the four work weeks before the work week in which the *substitute* day falls.

Regular wages don't include any overtime or premium pay payable to an employee.

Vacation pay includes:

- all vacation pay payable to an employee when he or she is on vacation during part or all of the four work weeks before the public holiday (or the substitute day);
- vacation pay payable to an employee who has agreed *in writing* to having this money paid on each pay cheque; and
- vacation pay payable to an employee who has agreed *in writing* to have his or her vacation pay paid at any other time.



Calculating the Four-Week Period Before a Week With a Public Holiday

The "four work weeks ending just before the work week with the public holiday" doesn't necessarily mean the four *calendar* weeks immediately before the holiday. This period is based on the *employer's work week*.

Here's an example:

Christmas Day falls on a Tuesday. Suppose that an employer's work week runs from Thursday to Wednesday. In this case, the four work weeks used to calculate public holiday pay are those four weeks counting backwards from the first Wednesday (the last day of the employer's work week) before the day on which the public holiday falls.

Sun.	Mon.	Tues.	Wed.	Thurs.	Fri.	Sat.
18 (Nov.)	19	20	21	22	23	24
25	26	27	28	29	30	1 (Dec.)
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25 Public Holiday	26	27	28	29

In this example, the regular wages and vacation pay payable to the employee in the four work weeks indicated by the shaded area – November 22 to December 19 – are used in the calculation of public holiday pay.

Calculating Public Holiday Pay

Here are several examples of how an employee's public holiday pay is calculated.

A typical case

Farida works five days a week and earns \$100.00 a day. She worked her last regularly scheduled work day before the public holiday and her first regularly scheduled day after the holiday.

1. Farida's total regular wages are calculated:
 $\$100.00 \text{ per day} \times 5 \text{ days} = \$500.00 \text{ per week}$
 $\$500.00 \text{ per week} \times 4 \text{ work weeks} = \$2,000.00$
Farida earned \$2,000.00 in the four work weeks before the public holiday.

2. Then her total wages are divided by 20:
 $\$2,000.00 \div 20 = \$100.00$

Result: Farida is entitled to \$100.00 public holiday pay.

When vacation time is involved

Brad works five days a week and earns \$100.00 a day. He was on vacation for two of the four weeks before the public holiday. He is paid \$1,000.00 vacation pay for his two weeks of vacation. Brad worked his last regularly scheduled work day before the public holiday and his first regularly scheduled work day after the holiday.

1. Brad's wages and vacation pay are added together:
Brad worked 10 days. $10 \times \$100.00 = \$1,000.00$
Brad also received 10 days vacation pay = \$1,000.00
His wages and vacation pay total \$2,000.00.
2. Brad's total wages and vacation pay are then divided by 20:
 $\$2,000.00 \div 20 = \$100.00$

Result: Brad is entitled to \$100.00 public holiday pay.

When an employee works part-time and each pay cheque includes vacation pay

Tegan works three days a week and earns \$100.00 a day. She worked her last regularly scheduled work day before the public holiday and her first regularly scheduled day after the holiday. She and her employer have agreed in writing that she will receive four per cent vacation pay on each cheque.

1. First Tegan's wages are calculated:
 $\$100.00 \text{ per day} \times 3 \text{ days} = \$300.00 \text{ per week}$
 $\$300.00 \text{ per week} \times 4 \text{ weeks} = \$1,200.00$
2. Her vacation pay is also calculated:
 $\$4.00 \text{ per day (4\% of \$100.00)} \times 3 \text{ days} = \$12.00 \text{ per week}$
 $\$12.00 \text{ per week} \times 4 \text{ weeks} = \$48.00$
3. Then her wages and vacation pay are added together:
 $\$1,200.00 + \$48.00 = \$1,248.00$
4. Tegan's total wages and vacation pay are then divided by 20:
 $\$1,248.00 \div 20 = \$62.40$

Result: Tegan is entitled to \$62.40 public holiday pay.

When there are no set hours and each pay cheque includes vacation pay

Andrea doesn't work a set number of hours per day or days per week. Her pay varies from week to week, according to the time she has worked. She and her employer have agreed in writing that she will receive four per cent vacation pay on each pay cheque.



1. Andrea's total wages and vacation pay for the four weeks before the holiday are added:
 - \$1,500.00 wages + \$60.00 vacation pay = \$1,560.00
 - Andrea's wages and vacation pay total \$1,560.00.
2. Andrea's total wages and vacation pay are then divided by 20:
 - $\$1,560.00 \div 20 = \$78.00$

Result: Andrea is entitled to \$78.00 public holiday pay.

When an employee is on a leave

Carla usually works five days a week, earning \$100.00 a day. On June 10, she went on a 17-week pregnancy leave, followed by a 35-week parental leave. During her leaves, she wasn't paid wages or vacation pay. She received maternity and parental benefits from the federal Employment Insurance program, but these benefits aren't considered "wages."

Carla is entitled to receive public holiday pay for the public holidays that fall during her leave as long as she works her last regularly scheduled day before her leave and her first regularly scheduled day after her leave, or has reasonable cause for failing to do so.

However, because Carla didn't earn wages or vacation pay during her leaves, the amount of public holiday pay she is entitled to will be minimal.

For example, because she went on leave on June 10, she had only worked seven days during the four work weeks before the Canada Day public holiday. Her public holiday pay for Canada Day equals:

- \$100.00 a day X 7 days = \$700.00
- \$700.00 ÷ 20 = \$35.00 public holiday pay

Her public holiday pay for the rest of the public holidays that fall during her leave will be zero. This is because she won't have earned any wages on any of the days during the four work weeks before each of those holidays.

When an employee is on a layoff that lasts about a month or more

Eugen usually works five days a week, earning \$100.00 a day. He was placed on temporary layoff on November 15. During his layoff, Eugen wasn't paid wages or vacation pay. He received employment insurance benefits during this time, but these benefits aren't considered "wages."

Eugen is recalled to work on December 27. He is entitled to be paid public holiday pay for Christmas Day and Boxing Day as long as he works his last regularly scheduled day before the layoff and his first regularly scheduled day after the layoff, or has reasonable cause for failing to do so.

However, because Eugen didn't earn any wages or vacation pay in the four work weeks before those two public holidays, the amount of public holiday pay he is entitled to will be zero.

Premium Pay

Premium pay is 1½ times an employee's regular rate of pay. Employees who are entitled to receive premium pay for work on a public holiday must be paid 1½ times their regular rate of pay for each hour they work.

For example, Nathan's regular rate of pay is \$10.00 an hour. This means that his premium pay will be \$15.00 an hour (\$10.00 X 1½).

Substitute Holiday

A substitute holiday is another working day off work that is designated to replace a public holiday. Employees are entitled to be paid public holiday pay for a substitute holiday.

A substitute holiday must be scheduled for a day that is no later than three months after the public holiday for which it was earned. Or, if the employee has agreed *in writing*, the substitute day off can be scheduled up to 12 months after the public holiday.

entitlements

Entitlements for public holidays vary depending on such things as whether the holiday falls on a working day or a non-working day and whether the employee works on the holiday. The different entitlements are set out below.

When a Public Holiday Falls on a Working Day but the Employee Doesn't Work

Most employees get the public holiday off and get paid public holiday pay. (Some employees may be required to work on a public holiday. See *Special Rules for Certain Industries* later in this chapter.)

When a Public Holiday Falls on an Employee's Non-Working Day or During an Employee's Vacation

When a public holiday falls on a day that isn't ordinarily a working day for an employee, or during the employee's vacation, the employee is entitled to either:

- a substitute holiday off with public holiday pay (this substitute day off must be scheduled for a day that is no later than three months after the public holiday. Or, if the employee has agreed *in writing*, the substitute day off can be scheduled up to 12 months after the public holiday);

OR

- public holiday pay for the public holiday, if the employee agrees *in writing* (in this case, the employee won't be given a substitute day off).

When an Employee Has Agreed in Writing to Work on a Public Holiday

Most employees get the public holiday off and get paid public holiday pay. However, if an employee agrees *in writing* to work on the public holiday, there are two options:

- The employee is entitled to receive regular wages for all hours worked on the public holiday plus another regular working day off work with public holiday pay. This substitute day off must be scheduled for a day that is no later than three months after the public holiday. Or, if the employee has agreed *in writing*, the substitute day off can be scheduled up to 12 months after the public holiday.

OR

- if the employee agrees *in writing*, he or she is entitled to public holiday pay for the public holiday plus premium pay for all hours worked on the public holiday. In this case, the employee won't be given a substitute day off.

Calculating Public Holiday Pay Plus Premium Pay

The following example shows how to calculate the amount to which an employee is entitled when he or she has agreed to work on a public holiday and receive public holiday pay plus premium pay for each hour worked.

An example

A public holiday falls on one of Betty's normal working days. She and her employer have agreed *in writing* that she will work on the public holiday and that, instead of getting a substitute holiday, she will be paid public holiday pay plus premium pay for all the hours she works on the holiday.

Betty regularly works eight hours a day, five days a week. Her regular hourly pay rate is \$7.00. She has worked on all her scheduled work days in the four work weeks before the public holiday. She works eight hours on the public holiday.

1. First Betty's total regular wages are calculated:
8 hours per day X \$7.00 per hour = \$56.00 per day
\$56.00 per day X 5 days = \$280.00 per week
\$280.00 X 4 work weeks = \$1,120.00
Betty earned \$1,120.00 in the four work weeks before the public holiday.
2. Her total wages are then divided by 20:
 $\$1,120.00 \div 20 = \$56.00$
Betty's public holiday pay entitlement is \$56.00.
3. Finally, the premium pay owing to Betty is calculated:
\$7.00 per hour X $1\frac{1}{2}$ = \$10.50
\$10.50 per hour X 8 hours worked = \$84.00
Betty's premium pay entitlement is \$84.00.

Result: Betty is entitled to public holiday pay of \$56.00 and premium pay of \$84.00, for a total of \$140.00

When an Employee Agrees to Work on a Public Holiday but Fails to Do So

If an employee has agreed *in writing* to work on the public holiday but doesn't do so – and doesn't show reasonable cause for not having done so – the employee has no right to public holiday pay or to a substitute day off with pay.

However, if the employee can show reasonable cause for not working the public holiday and:

- if the employee had agreed in writing to work on the public holiday for regular wages plus a substitute day off with public holiday pay, the employee is entitled to a substitute day off work with public holiday pay. This substitute day off must be scheduled for a day that is no later than three months after the public holiday. Or, if the employee has agreed *in writing*, the substitute day off can be scheduled up to 12 months after the public holiday.

OR

- if the employee had agreed in writing to work on the public holiday for public holiday pay plus premium pay for each hour worked, he or she is entitled to be paid public holiday pay for the holiday. The employee isn't entitled to receive any premium pay because he or she didn't perform any work on the holiday.

When an Employee Works Only Some of the Hours He or She Agreed to Work on a Public Holiday

If an employee has agreed *in writing* to work on the public holiday but works only some of the hours he or she agreed to work, and doesn't show reasonable cause for failing to work all of the hours, the employee is only entitled to receive premium pay for each hour worked on the holiday. The employee has no right to public holiday pay or a substitute day off work.

Here's an example:

Stanislaw had agreed in writing that he would work eight hours on Canada Day, but he only worked four hours and didn't have reasonable cause for failing to work the other four hours. Stanislaw is entitled only to premium pay for the four hours he worked on the holiday. He isn't entitled to public holiday pay or to a substitute day off work.

However, if the employee can show reasonable cause for working only some of the hours he or she agreed to work on the public holiday:

- the employee is entitled to his or her regular rate for all the hours worked plus a substitute day off work with public holiday pay. This substitute day off must be scheduled for a day that is no later than three months after the public holiday. Or, if the employee has agreed *in writing*, the substitute day off can be scheduled up to 12 months after the public holiday.

OR

- if the employee had agreed earlier *in writing* to work on the public holiday for public holiday pay plus premium pay for each hour worked, he or she is entitled to be paid public holiday pay plus premium pay for every hour worked on the holiday.

special rules for certain industries

Special rules apply to employees who work in the following types of businesses:

- hotels, motels and tourist resorts;
- restaurants and taverns;
- hospitals and nursing homes; and
- continuous operations (which are operations, or parts of operations, that don't stop or close more than once a week – such as an oil refinery, alarm-monitoring company or 24-hour convenience store).

An employee who works in any of these businesses can be required to work on a public holiday without his or her agreement *if* the holiday falls on a day that the employee would normally work and the employee isn't on vacation. If an employee is required to work, he or she is entitled to either:

- his or her regular rate for the hours worked on the public holiday, plus a substitute day off work with public holiday pay (this substitute day off must be scheduled for a day that is no later than three months after the public holiday. Or, if the employee has agreed *in writing*, the substitute day off can be scheduled up to 12 months after the public holiday);

OR

- public holiday pay plus premium pay for each hour worked.

The *employer* chooses which of these options will apply.

Note that the employer's ability to require employees to work on a public holiday is subject to the employee's right to take a day off for purposes of religious observance under the Ontario Human Rights Code, and to the terms of the employee's employment contract.

An employee in the previously listed businesses who is required to work on a public holiday but fails to do so, with reasonable cause, is entitled to:

- a substitute holiday with public holiday pay. The substitute day must be scheduled for a day that is no later than three months after the public holiday. Or, if the employee has agreed *in writing*, the substitute day off can be scheduled up to 12 months after the public holiday.

OR

- public holiday pay for the holiday.

The *employer* chooses which option will apply.

An employee in any of these businesses who is required to work on a public holiday but who fails, with reasonable cause, to work some of the hours he or she was required to work on the holiday is entitled to either:

- his or her regular rate for each hour worked on the holiday plus a substitute holiday with public holiday pay. The substitute day must be scheduled for a day that is no later than three months after the public holiday. Or, if the employee has agreed *in writing*, the substitute day off can be scheduled up to 12 months after the public holiday;

OR

- public holiday pay for the holiday plus premium pay for each hour worked.

The *employer* chooses which option will apply.

overtime calculations when an employee receives premium pay

Any hours worked on a public holiday that are compensated with premium pay are *not* included when determining whether an employee has worked any overtime hours.

if employment ends

Sometimes an employee's job comes to an end before the employee can take a substitute holiday with public holiday pay that he or she has earned. In this case, the employer must pay the employee's public holiday pay at the same time it pays the employee's final wages.

Retail Workers

There are certain rights in the *ESA* that apply only to employees of most retail businesses.

the right to refuse to work on public holidays

An employee of a retail business has the right to refuse to work on a public holiday even if the employee doesn't qualify for the public holiday.

If an employee has agreed *in writing* to work on a public holiday, the employee can later decline to work on that day by giving the employer at least 48 hours' notice before the employee's work was to begin.

retail business

A retail business is a business that sells goods or services to the public.

the right to refuse to work on sundays

There are two sets of rules for employees of retail businesses. The rule that applies depends on whether the employee was hired before or after September 4, 2001.

Sunday Rules for Employees Hired Before September 4, 2001

An employee of a retail business who was hired before September 4, 2001 has the right to refuse to work on Sundays.

If an employee has agreed to work on Sundays, whether or not the agreement was made when he or she was hired, the employee can later decline to work on a Sunday by giving the employer at least 48 hours' notice before the employee's work was to begin.

Sunday Rules for Employees Hired On or After September 4, 2001

An employee of a retail business who was hired on or after September 4, 2001 has the right to refuse to work on Sundays *unless* the employee agreed in writing at the time of being hired to work on Sundays.



An employee who has agreed in writing at the time of being hired to work on Sundays can decline to work on Sundays for reasons of religious belief or religious observance.

An employer can't make it a condition of hiring an employee that the employee must agree to work on Sundays if to do so would violate the *Human Rights Code*. (Contact the Ontario Human Rights Commission for further information.)

An employee who did not agree in writing at the time of being hired to work on Sundays can agree to work on a Sunday. This employee can later decline to work on a Sunday by giving the employer at least 48 hours' notice before the employee's work was to begin.

no reprisals

An employee can't be dismissed, intimidated or penalized in any way for exercising his or her rights under this section.

exclusions

Retail businesses are *excluded* from these provisions if their main business is to:

- sell prepared meals (e.g., restaurants, cafeterias, cafés);
- rent living accommodations (e.g., hotels, tourist resorts, camps, inns);
- provide educational, recreational or amusement services to the public (e.g., museums, art galleries, sports stadiums); or
- sell goods and services that are secondary to the *businesses* described above and are located on the same premises (e.g., museum gift shops, souvenir shops in sports stadiums).

Benefit Plans

Employers aren't required to provide employee benefit plans. However, if an employer does decide to provide them, the rule against discrimination under the *ESA* must be applied to certain plans.

the anti-discrimination rule

The *ESA* prohibits discrimination between employees or their dependants, beneficiaries or survivors because of their age, sex, marital status or same-sex partnership status.

There are some exceptions to the anti-discrimination rules. They are complex. If you require further information, please contact the Ontario Ministry of Labour.

plans affected

The anti-discrimination rule applies to benefit plans including:

- superannuation, retirement and pension benefits;
- termination benefits;
- death benefits (including life insurance plans);
- disability benefits (including short-term and long-term disability plans);
- sickness benefits;
- accident benefits; and
- medical, hospital, nursing, drug or dental benefits.

The rule against discrimination applies to both the plan's contribution requirements and its benefit payments.

discriminations that aren't allowed

The following distinctions between employees or their dependants, beneficiaries or survivors aren't allowed.



Age

An employer can't discriminate between employees who are 18 or over but under 65.

Sex

An employer can't discriminate between male and female employees, or against pregnant employees. Also, there can't be a distinction between employees because they are, or aren't, the head of a household or the primary wage earner.

Marital Status

An employer can't discriminate between single and married employees, including those who live in common-law marriages, or against unmarried employees supporting dependent children.

Same-Sex Partnerships

An employer can't discriminate against an employee who is living with a same-sex partner.

While an Employee is on a Leave of Absence

An employee who is on pregnancy, parental or emergency leave has the right to continue to participate in pension plans, life insurance plans, accidental death plans, extended health plans and dental plans during his or her leave.

Other benefit plans may allow employees on other types of leave to continue to participate in the plan while they are on leave. In that case, employees on pregnancy, parental or emergency leave are also allowed to continue to participate in such plans while they are on leave (this includes any pregnancy, parental or emergency leave negotiated between an employee or union and an employer that is longer than the *ESA* provides).

(See "Pregnancy and Parental Leave" and "Emergency Leave" for more information on rights to benefit plans during leaves.)

Pregnancy and Parental Leave

Pregnant employees have the right to take *Pregnancy Leave* of up to 17 weeks of unpaid time off work. In some cases the leave may be longer.

Both new parents have the right to take *Parental Leave* – unpaid time off work. Birth mothers who took pregnancy leave are entitled to up to 35 weeks' leave. Employees who didn't take pregnancy leave are entitled to up to 37 weeks' leave.

Parental leave isn't part of pregnancy leave. A birth mother can take both pregnancy *and* parental leave.

Both parents can be on leave at the same time. For example, a father can take parental leave at the same time the mother is on pregnancy or parental leave.

Employees are entitled to pregnancy and parental leave regardless of the type of employment relationship they have – full-time or part-time, permanent or contract.

An employer can't penalize an employee *in any way* because the employee is or will be eligible to take a pregnancy or parental leave, or for taking or planning to take a pregnancy or parental leave.

In most cases, employees must be given their old job back at the end of their pregnancy or parental leave.

Ontario's *ESA* and the federal *Employment Insurance Act*

Pregnancy leave and parental leave under the *ESA* are different from maternity benefits and parental benefits under the federal *Employment Insurance Act*. The rules about the timing and length of pregnancy and parental leaves under the *ESA* are very different from the rules about timing and length of leaves as they relate to benefits under the federal *Employment Insurance Act*.

You should contact your nearest federal government Human Resource Development Canada centre for information about employment insurance benefits.

pregnancy leave

An employer isn't required to pay an employee who is on pregnancy leave.

Qualifying for Pregnancy Leave

A pregnant employee is entitled to pregnancy leave if she was hired at least 13 weeks before the date her baby is *expected* to be born (sometimes called the "due date").

Note that an employee doesn't have to *actively* work for 13 weeks to be eligible for pregnancy leave. It's only necessary for there to be 13 weeks between her *date of hire* and her due date.

Here are some examples.

A typical case

Tegan was hired 15 weeks before her due date. She is eligible to begin her pregnancy leave *at any time* after being hired, because there are at least 13 weeks between the date she was hired and her due date.

pregnancy leave

Pregnant employees have the right to take pregnancy leave: up to 17 weeks of unpaid time off work. (In some cases the leave may be longer.)

When an employee is off sick

Fatima was hired 15 weeks before her due date. Soon after starting her new job, she was off sick for five weeks. Fatima is eligible for pregnancy leave because there are at least 13 weeks between the date she was hired and her due date. The fact that she didn't actually work 13 weeks is irrelevant.

When a baby is premature

Meredith was hired 15 weeks before her due date. However, 11 weeks after she was hired, her baby was born. Meredith is eligible for pregnancy leave *to begin on the date the baby was born*, because there were at least 13 weeks between the date she was hired and her due date. The fact that her baby was born less than 13 weeks after she was hired is irrelevant.

When a Pregnancy Leave Can Begin

Usually, the *earliest* a pregnancy leave can begin is 17 weeks before the employee's due date. However, whenever an employee has a *live* birth, she will be able to begin her pregnancy leave on the date of the birth.

Ordinarily, the *latest* a pregnancy leave can begin is on the baby's due date. However, if the baby is born earlier than the due date, the latest the leave can begin is the day the baby is born.

Within these restrictions, an employee can start her pregnancy leave any time she chooses. The employer can't decide when the employee will begin her leave – even if the employee is sick or if her pregnancy limits the type of work she can do.

Length of a Pregnancy Leave

A pregnancy leave can last a maximum of 17 weeks for most employees. An employee may decide to take a shorter leave if she wishes.

However, once an employee has started her pregnancy leave, she must take it all at once. She *can't* use up part of the 17 weeks, return to work and then go back on pregnancy leave for the unused portion. If she returns to work for the employer from whom she took the leave, even if it is only part-time, under the ESA she gives up the right to take the rest of her leave.

Miscarriages and Stillbirths

If an employee has a miscarriage or stillbirth, she is eligible for pregnancy leave only if the miscarriage or stillbirth occurred within 17 weeks before the due date.

The pregnancy leave of an employee who has a miscarriage or stillbirth ends on the date that is the *later* of:

- 17 weeks after the leave began;
- OR**
- six weeks after the stillbirth or miscarriage.

This means that the pregnancy leave of an employee who has a stillbirth or miscarriage will be at least 17 weeks long. In some cases it may be longer.

An employee can choose to take a shorter leave if she wishes.

Here are two examples:

When an employee has a stillbirth

Wai began her pregnancy leave 15 weeks before her baby was due. On her due date she had a stillbirth. The law says that the pregnancy leave ends on the date that is the later of 17 weeks after the leave began or six weeks after the stillbirth.



In this case, the later date is six weeks after the stillbirth. Wai can stay off work for up to six more weeks after the stillbirth, for a total of 21 weeks of pregnancy leave.

When an employee has a miscarriage

Hélène began her pregnancy leave 15 weeks before her baby was due. One week later (one week into her pregnancy leave) she had a miscarriage. The law says that her pregnancy leave ends on the date that is the later of either 17 weeks after the leave began or six weeks after the miscarriage.

In Hélène's case, the later date is 17 weeks after the leave began. She will get a total of 17 weeks of pregnancy leave.

Giving Notice about Starting a Pregnancy Leave

An employee must give her employer at least two weeks' *written notice* before beginning her pregnancy leave. Also, if the employer requests it, she must provide a certificate from a medical practitioner.

Changing the Date a Pregnancy Leave Starts

Suppose an employee has given notice to begin a pregnancy leave. She can begin the leave *earlier* than she originally told her employer if she gives her employer new *written notice* at least two weeks before the *new, earlier date*.

Here's an example:

Changing the start of a pregnancy leave to an earlier date

Barbara gave her employer written notice that she would begin her pregnancy leave on September 10. Now Barbara wants to start her leave on August 27. She must give her employer new written notice by August 13 (two weeks before August 27).

An employee can also change the date she will begin her leave to a later date than she originally told her employer. To do this, she must give her employer new *written notice* at least two weeks before the *original date* she said she would begin her leave.

Here's an example:

Changing the start of a pregnancy leave to a later date

Mairead gave her employer written notice that she would start her pregnancy leave on September 10. Now Mairead wants to start her leave on September 15. She must give her employer new written notice by August 27 (two weeks before September 10).

Sometimes an employee has to stop working earlier than expected because of complications caused by the pregnancy. In this case, the employee has two weeks after she stops working to give the employer *written notice* of the day the pregnancy leave began or will begin.

An employee doesn't have to start her pregnancy leave when she stops working. She can go on sick leave if she chooses. If the employer requests it, the employee has to provide a medical certificate supporting her inability to work and stating the baby's due date.

If an employee stops working earlier than expected because of a birth, stillbirth or miscarriage, she has two weeks after she stops working to give the employer *written notice* of the day the leave began. The pregnancy leave begins no later than the date of the birth, stillbirth or miscarriage. If the employer requests it, the employee has to provide a medical certificate stating the due date and the date of birth, stillbirth or miscarriage.

Failing to Give Notice

An employee who fails to give the required notice *doesn't* lose her right to a pregnancy leave. She may fail to give notice because she didn't know she had to, or because she was unable to under the circumstances.

Giving Notice About Ending a Pregnancy Leave

An employee can tell her employer when she will be returning to work, but she isn't required to do so. If the employee doesn't specify a return date, the employer is to assume that she will take her full 17 weeks of leave (or any longer period that she may be entitled to).

An employer can't require an employee to return from her leave early. Also, an employer can't require an employee to prove, through medical documentation, that she is fit to return to work. The choice to return to work is the employee's.

Changing the Date a Pregnancy Leave Ends

An employee may want to change the date her leave was scheduled to end to an *earlier* date. If so, she must give the employer a *new* written notice at least four weeks before the *new, earlier* day.

An employee may want to change the date her leave was scheduled to end to a later date. In this case, she must give the employer a *new* written notice at least four weeks before the date the leave was *originally* going to end. Unless the employer agrees, she can't schedule a new end date to her pregnancy leave that would result in her taking a longer leave than she is entitled to under the ESA.

When an Employee Decides Not to Return to Work

Suppose an employee wants to resign before the end of her pregnancy leave, or at the end of the leave. She must give her employer at least four weeks' written notice of her resignation. This notice requirement doesn't apply if the employer constructively dismisses the employee. (See *Constructive Dismissal* in the "Termination of Employment" and "Severance Pay" chapters.)

parental leave

An employer isn't required to pay an employee who is on parental leave.

Qualifying for Parental Leave

To qualify, an employee who is a new parent must have been hired at least 13 weeks before the leave begins.

Note that an employee doesn't have to *actively* work for 13 weeks to be eligible for parental leave. The employee could be on layoff, vacation, sick leave or pregnancy leave for all or part of the 13-week qualifying period and still be entitled to parental leave.

A "parent" includes:

- a birth parent;
- an adoptive parent (whether or not the adoption has been legally finalized); or
- a person who is in a relationship of some permanence with a parent of the child and who plans on treating the child as his or her own. This includes same-sex couples.

parental leave

Both new parents have the right to take parental leave: up to 35 or 37 weeks of unpaid time off work.



When a Parental Leave Can Begin

A birth mother who takes pregnancy leave must ordinarily begin her parental leave as soon as her pregnancy leave ends.

However, an employee's baby may not yet have come into her care for the first time when the pregnancy leave ends. For example, perhaps her baby has been hospitalized since birth and is still in the hospital's care when the pregnancy leave ends.



If this is the case, the employee can choose to return to work and start her parental leave once the baby comes home. However, she doesn't *have* to wait until the baby comes home to begin her parental leave.

All other parents must *begin* their parental leave no later than 52 weeks after:

- the date their baby is born;

OR

- the date their child *first* came into their care, custody and control.

The parental leave doesn't have to be *completed* within this 52-week period. It just has to be started.

Length of a Parental Leave

Birth mothers who take pregnancy leave are entitled to take up to 35 weeks of parental leave.

All other new parents are entitled to take up to 37 weeks of parental leave.

Employees may decide to take a shorter leave if they wish. However, once an employee has started parental leave, he or she must take it all at one time. The employee *can't* use up part of the leave, return to work for the employer and then go back on parental leave for the unused portion.

(Note: the rules under the federal Employment Insurance program are different. Under that program, employees are able to return to work and earn a certain amount of wages without having their employment insurance benefits reduced.)

Miscarriages and Stillbirths

An employee who has a miscarriage or stillbirth, or whose spouse or same-sex partner has a miscarriage or stillbirth, is *not* eligible for parental leave.

Giving Notice About Starting a Parental Leave

An employee must give his or her employer at least two weeks' *written notice* before beginning a parental leave. If an employee is also taking a pregnancy leave, she can give her employer notice of both leaves at the same time. But she doesn't have to.

Changing the Date a Parental Leave Starts

Suppose an employee has given notice to begin a parental leave. The employee can begin the leave *earlier* than he or she has told the employer by giving the employer new *written notice* at least two weeks before the *new, earlier* date.

Here's an example.

Changing the start of a parental leave to an earlier date

Jon gave his employer written notice that he would begin his parental leave on September 10. Now he wants to start his leave on August 27. Jon must give his employer new written notice by August 13 (two weeks before August 27).

An employee can also change the starting date of the leave to a *later* date than he or she originally told the employer. To do this, the employee must give the employer new *written* notice at least two weeks before the *original date* the leave was going to begin.

Here's an example.

Changing the start of a parental leave to a later date

Wendy gave her employer written notice that she would start her parental leave on September 10. Now Wendy wants to start her leave on September 15. She must give her employer new written notice by August 27 (two weeks before September 10).

An employee may have to stop working earlier than expected because the child comes into his or her custody, care and control for the first time earlier than expected. In this case, the employee has two weeks after stopping work to give the employer written notice that he or she is taking parental leave. The parental leave begins on the day the employee stops working.

Failing to Give Notice

An employee who fails to give the required notice *doesn't* lose his or her right to a parental leave. The failure might occur because the employee didn't know he or she had to give notice, or because the employee was unable to under the circumstances.

Giving Notice About Ending a Parental Leave

An employee can tell the employer when he or she will be returning to work, but isn't required to do so. If the employee doesn't specify a return date, the employer is to assume that the employee will take his or her full 35 or 37 weeks of leave.

An employer can't require an employee to return from leave early.

Changing the Date a Parental Leave Ends

An employee may want to return to work *earlier* than the date he or she was scheduled to return. If so, the employee must give the employer written notice at least four weeks before the *new, earlier* day.

An employee may want to return to work *later* than he or she was scheduled to return. In this case, the employee must give the employer *new* written notice at least four weeks before the date the employee was *originally* going to return. However, unless the employer agrees, the employee can't schedule a new return date that would result in the employee taking a longer leave than he or she is entitled to under the *ESA*.

When an Employee Decides Not to Return to Work

Suppose an employee decides to resign before the end of his or her parental leave, or at the end of the leave. The employee must give the employer at least four weeks' written notice of the resignation. This notice requirement doesn't apply if the employer constructively dismisses the employee. (See *Constructive Dismissal* in the "Termination of Employment" and "Severance Pay" chapters.)

rights during pregnancy and parental leaves

Employees on pregnancy or parental leave have several rights.

The Right to Reinstatement

In most cases, an employee who takes a pregnancy or parental leave is entitled to:

- the same job the employee had before the leave began;
- OR**
- a comparable job, if the employee's old job no longer exists.

In either case, the employee must be paid at least as much as he or she was earning before the leave.

Suppose an employee's pay would have gone up if he or she hadn't been on leave. In this case, the employee must be given the higher pay on returning to work.

If an employer has dismissed an employee for legitimate business reasons that are *totally* unrelated to the fact that the employee took a leave, the employer doesn't have to reinstate the employee.

The Right to Be Free from Penalty

Employers can't penalize an employee *in any way* because the employee:

- took a pregnancy or parental leave;
- plans to take a pregnancy or parental leave;
- is eligible to take a pregnancy or parental leave; or
- will become eligible to take a pregnancy or parental leave.

The Right to Continue to Participate in Benefit Plans

Employees on pregnancy or parental leave have a right to continue to take part in certain benefit plans that their employer may offer. These include:

- pension plans;
- life insurance plans;
- accidental death plans;
- extended health plans; and
- dental plans.

The employer must continue to pay its share of the premiums for any of these plans that were offered before the leave, unless the employee tells the employer *in writing* that he or she won't continue to pay his or her own share of the premiums (if any).

In most cases, employees must continue to pay their share of the premiums in order to continue to participate in these plans.

Employees who are on pregnancy or parental leave can also continue to participate in other benefit plans if employees who are on other types of leave are able to continue to participate in those plans.

In addition, a birth mother may be entitled to disability benefits during that period of the leave that she would otherwise have been absent from work for health reasons related to the pregnancy or birth.

The Right to Earn Credits for Service and Seniority

Although an employee doesn't have to be paid during a pregnancy or parental leave, the employee continues to earn credits toward seniority, service and length of employment – just as if he or she had stayed at work.

Here are three examples:

Length of service

Trin's employment contract states that she earns 1½ paid vacation days for every month of service. Her length of service continues to accrue (accumulate) while she's on pregnancy and parental leave. This means she continues to earn 1½ days of paid vacation every month during her leaves, and she's entitled to full vacation with pay after she returns to work.

Vacation time versus vacation pay

Yves earns two weeks of vacation time for every 12 months he's employed. Because his length of employment continues to accrue while he's on parental leave, Yves continues to accrue vacation *time* during his leave just as if he were still at work.

However, Yves' vacation *pay* is calculated as four per cent of the gross *wages* he earns. He isn't earning any wages during his parental leave. Therefore, he doesn't earn any vacation *pay* while he is on leave.

Seniority

Karen is a member of a union that has bargaining rights at her workplace. Under the collective agreement, an employee's seniority determines such things as order of layoff and recall, job promotions and annual vacation entitlements. Karen continues to accrue seniority for all purposes during her pregnancy and parental leaves, just as if she had been actively employed.

Probation

The period of a leave isn't included when determining whether an employee has completed a probationary period. If an employee was on probation at the start of a leave, he or she must complete the probationary period after returning to work.

Emergency Leave

Some employees have the right to take up to 10 days of unpaid time off work every calendar year because of illness, injury, certain emergencies or other urgent matters. This is known as *emergency leave*.

eligibility

Only employees in companies that regularly employ at least 50 employees are entitled to emergency leave.

An employee can take an unpaid emergency leave of absence for the following reasons:

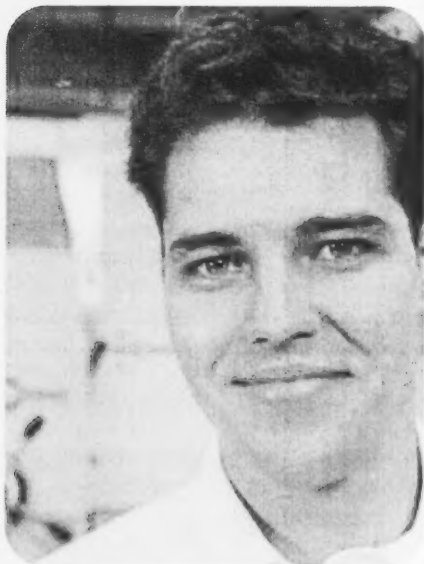
- personal illness, injury or medical emergency;
- death, illness, injury, medical emergency or other urgent matter relating to –
 - a spouse or same-sex partner;
 - a parent, step-parent, foster parent, child, stepchild, foster child, grandparent, step-grandparent, grandchild or step-grandchild of the *employee*, the *employee's spouse* or the *employee's same-sex partner*;
 - the spouse or same-sex partner of an employee's child;
 - a brother or sister of the employee; and
 - a relative of the employee who is dependent on the employee for care or assistance.

length of a leave

An emergency leave of absence can last up to 10 days a calendar year. These days don't have to be taken consecutively.

Taking a Part-Day Leave

If an employee takes only part of a day as emergency leave, the employer can count it as a full day of leave.



Here's an example:

Part-day emergency leave

Kevin's daughter is sick, and her doctor has scheduled some tests at the hospital. Kevin tells his employer that he has to be away from work for the afternoon to take his daughter for the tests. Kevin takes the afternoon as an emergency leave of absence.

Although Kevin only needs half of the day, the employer can count the absence as a full day of leave.

notice about taking an emergency leave

An employee must inform the employer that he or she will be taking an emergency leave of absence.

When There's No Time to Give Notice

If an employee has to begin an emergency leave before notifying the employer, the employee must inform the employer as soon as possible.

Here's an example.

Early-morning emergency

Carlos works from 8 a.m. to 4 p.m. Early in the evening, he is told by his doctor that his daughter needs tests at 8 a.m. the following day. Because Carlos' workplace had closed for the day when he learned this, he couldn't tell his employer that he was going to take an emergency leave. Carlos is required to inform his employer as soon as possible that he has taken the leave.

proof of entitlement to an emergency leave

An employer is allowed to ask an employee to provide proof that he or she is eligible for an emergency leave of absence. The employee is required to provide proof that is reasonable in the circumstances.

rights during an emergency leave

Employees who take an emergency leave are entitled to the same rights as employees who take a pregnancy or parental leave. (See *Rights During Pregnancy and Parental Leaves* in the "Pregnancy and Parental Leave" chapter.)

Termination of Employment

In most cases, when an employer ends the employment of an employee who has been continuously employed for three months, the employer must provide the employee with *either* written notice of termination *or* termination pay.

The employer may also provide the employee with a combination of written notice and termination pay as long as the notice and the termination pay together equal the length of notice the employee is entitled to receive.

There are a number of exemptions to the termination of employment provisions of the *ESA*. (See Industry/Occupation Exemptions and Special Rules for details.)

The termination-of-employment rules are entirely separate from any entitlements an employee may have to be paid severance pay under the *ESA*. (See "Severance Pay," for details.)

what is a termination of employment?

A number of expressions are commonly used to describe situations when employment is terminated. These include "let go," "discharged," "dismissed," "fired" and "permanently laid off."

Under the *ESA*, a person's employment is terminated if the employer:

- dismisses or stops employing an employee, including an employee who is no longer employed due to the bankruptcy or insolvency of the employer;
- "constructively" dismisses an employee and the employee resigns, in response, within a reasonable time; and
- lays an employee off for a period that's longer than a "temporary layoff".

An employer isn't required to give an employee a reason why his or her employment is being terminated. However, there are some reasons an employer can't use to terminate an employee's employment. For example, an employer can't terminate an employee for asking questions about the *ESA*, refusing to work excess hours, or taking a pregnancy, parental or emergency leave. (See "Role of the Ministry of Labour" for more details.)

The following paragraphs explain "constructive dismissal" and "temporary layoff."

Constructive Dismissal

A constructive dismissal may occur when:

- an employer makes a significant change to a fundamental term or condition of an employee's employment without the employee's actual or implied consent;

AND

- the employee resigns within a reasonable time of learning of the change.

A constructive dismissal may occur when an employer significantly reduces an employee's salary or makes a significant change to an employee's work location, hours of work, authority or position. Constructive dismissal may also apply when an employer significantly harasses or abuses an employee or when an employer gives an employee an ultimatum to "quit or be fired."

Constructive dismissal is a complex and difficult subject. An employee who thinks he or she may have been constructively dismissed should contact the Ministry of Labour for further information.

Temporary Layoff

An employer doesn't have to give an employee any notice of a temporary layoff. Nor does the employer have to provide a date when the employee can be expected to return to work at the time the employee is placed on the temporary layoff.

However, a temporary layoff may only last certain lengths of time. If the employer lays the employee off for longer than the period of a temporary layoff, the employer is considered to have terminated the employee's employment.

A "temporary layoff" is:

- A) not more than 13 weeks of layoff in any period of 20 consecutive weeks;

OR

- B) more than 13 weeks in any period of 20 consecutive weeks, but less than 35 weeks of layoff in any period of 52 consecutive weeks, where –
- the employee continues to receive substantial payments from the employer;
 - the employer continues to make payments for the benefit of the employee under a legitimate group or employee insurance plan (such as a medical or drug insurance plan) or a legitimate retirement or pension plan;
 - the employee receives supplementary unemployment benefits;
 - the employee would be *entitled* to receive supplementary unemployment benefits but isn't receiving them because he or she is employed elsewhere;
 - the employer recalls the employee to work within the time frame approved by the Director of Employment Standards; or
 - the employer recalls the employee within the time frame set out in an agreement with an employee who isn't represented by a trade union;

OR

- C) a layoff longer than a layoff described in 'B' where the employer recalls an employee who is represented by a trade union within the time frames set out in an agreement between the union and the employer.

week of layoff

For the purposes of the Termination provisions, a "week of layoff" is a week in which an employee receives less than half of the wages he or she would have earned at the *regular rate* for a *regular work week*.

A week of layoff doesn't include a week where the employee is:

- unavailable for work;
 - unable to work;
 - suspended for disciplinary reasons;
- OR**
- not provided with work because of a strike or lockout at his or her place of employment or elsewhere.

regular rate

This is an employee's rate of pay for each non-overtime hour of work in the employee's work week.

regular work week

For an employee who usually works the same number of hours every week, a regular work week is a week of that many hours, not including overtime hours.

written notice of termination and termination pay

Under the ESA:

- an employer can terminate the employment of an employee who has been employed continuously for three months or more if the employer has given the employee proper *written notice* of termination and the notice period has expired;

OR

- an employer can terminate the employment of an employee *without* written notice or with less notice than is required if the employer pays *termination pay* to the employee.

Written Notice of Termination

The written notice of termination that an employer is required to give an employee is called the "statutory notice period." If an employer provides longer notice than is required, the statutory part of the notice is the last part of the period that ends on the termination date.

The following chart specifies the periods of statutory notice required.

Length of Employment	Notice Required
Less than 3 months	None
3 months but less than 1 year	1 week
1 year but less than 3 years	2 weeks
3 years but less than 4 years	3 weeks
4 years but less than 5 years	4 weeks
5 years but less than 6 years	5 weeks
6 years but less than 7 years	6 weeks
7 years but less than 8 years	7 weeks
8 years or more	8 weeks

During the statutory notice period, an employer must:

- not reduce the employee's wage rate or alter a term or condition of employment;
- continue to maintain the employee's benefit plans; and
- pay the employee the wages he or she is entitled to, which can't be less than the employee's *regular wages* for a *regular work week* each week.

Some employees don't have a regular work week. That is, they don't work the same number of hours every week or they are paid on a basis other than time. For these employees, the "regular wages" for a "regular work week" is the average amount of the regular wages earned by the employee in the 12 weeks in which the employee worked immediately preceding the date the notice was given.

An employer isn't allowed to reduce an employee's entitlement to wages by scheduling an employee's vacation time during the notice period unless the employee – *after* receiving written notice of termination of employment – agrees to take his or her vacation time during the notice period.

How Written Notice is Given

In most cases, written notice of termination of employment must be addressed to the employee. It can be provided in person or by mail, fax or e-mail, as long as delivery can be verified.

There are special rules for providing the notice of termination if an employee has a contract of employment or a collective agreement that provides seniority rights, allowing an employee who is laid off or terminated to displace ("bump") other employees.

In that case, the employer must post a notice in the workplace (where it will be seen by the employees) setting out the names, seniority and job classification of those employees the employer intends to terminate and the date of the proposed termination. The posting of the notice is considered to be notice of termination – as of the date of the posting – to an employee who is named in the notice. However, this notice of termination must still meet the length requirements set out in the *ESA*.

If that employee exercises his or her bumping rights, the posting of the notice will instead be considered to be notice of termination – as of the date of the posting – to any employee “bumped” out of his or her job by the employee named in the notice.

Termination Pay

Termination pay is a lump sum payment equal to the *regular wages for a regular work week* that an employee would otherwise have been entitled to during the written notice period.

Some employees don't have a regular work week or are paid on a basis other than time worked. For these employees, the employer must pay the employee an amount equal to the average amount of regular wages earned by the employee per week for the weeks in which the employee worked in the 12-week period immediately preceding the day of termination.

An employee also earns vacation pay on his or her termination pay.

Here are two examples of how to calculate termination pay:

regular wages

These are wages that don't include all types of pay. Overtime pay, vacation pay, public holiday pay, premium pay, termination pay and severance pay aren't considered “regular wages.”

Regular work week

Eileen has worked for three and a half years. Now her job has been eliminated and her employment has been terminated. Eileen wasn't given any written notice of termination, and she is entitled to termination pay.

Eileen worked 40 hours a week every week and was paid \$12.00 an hour. She also received four per cent vacation pay. Because she worked for more than three years but less than four years, she is entitled to three weeks' pay in lieu of notice.

1. Eileen's regular wages for a regular work week are calculated:
 $\$12.00 \text{ an hour} \times 40 \text{ hours a week} = \$480.00 \text{ a week}$
2. Her termination pay is calculated:
 $\$480.00 \times 3 \text{ weeks} = \$1,440.00$
3. Then her vacation pay on her termination pay is calculated:
 $4\% \text{ of } \$1,440.00 = \$57.60$
4. Finally, her vacation pay is added to her termination pay:
 $\$1,440.00 + \$57.60 = \$1,497.60$

Result: Eileen is entitled to \$1,497.60.



No regular work week

Tim has worked at a nursing home for four years. He works every week, but his hours vary from week to week. His rate of pay is \$12.00 an hour, and he is paid six per cent vacation pay.

Tim's employer eliminated his position and didn't give Tim any written notice of termination. Tim was ill and off work for two of the 12 weeks immediately preceding the day his employment was terminated. Tim earned \$1,800.00 in the 12 weeks before the day on which his employment ended.

Tim is entitled to four weeks of termination pay.

1. Tim's average earnings per week are calculated:
 $\$1,800.00 \text{ for 12 weeks} \div 10 \text{ weeks (Tim was off sick for two weeks)} = \$180.00 \text{ a week}$
2. His termination pay is calculated:
 $\$180.00 \times 4 \text{ weeks} = \$720.00$
3. Then his vacation pay on his termination pay is calculated:
 $6\% \text{ of } \$720.00 = \$43.20$
4. Finally, his vacation pay is added to his termination pay:
 $\$720.00 + \$43.20 = \$763.20$

Result: Tim is entitled to \$763.20.

When to Pay Termination Pay

Termination pay must be paid to an employee *either* seven days after the employee is terminated *or* on the employee's next regular pay date, whichever is *later*.

employee benefits during the statutory notice period

An employer must maintain an employee's benefit plans during the statutory notice period. This applies even if the employee has been paid termination pay rather than working part or all of the notice period.

temporary work after termination

An employee can work for the employer on a temporary basis in the 13-week period *after* his or her employment has been terminated without affecting the original date of the termination. When the temporary work has ended, the employer isn't required to provide any further notice of termination to the employee.

If an employee works *beyond* the 13-week period after the termination date, the employee becomes entitled to written notice of termination as if it had never been given. The employee's period of employment will then also include the period of temporary work.

mass termination

Special rules for notice of termination may apply when the employment of 50 or more employees is terminated at an employer's establishment within a four-week period. This is called a mass termination. (An "establishment" can, in some circumstances, include more than one location.)

When a mass termination occurs, the employer must submit a form approved by the Director of Employment Standards *before* giving notice to the affected employees. If the employer fails to submit this form, any notice the employer gives to the employees isn't effective.

As well as providing employees with individual notices of termination, the employer must post a copy of the form approved by the Director of Employment Standards at the place of employment where employees can see it.

The amount of notice employees must receive in a mass termination isn't based on the employees' length of employment, but on the number of employees who have been terminated. An employer must give:

- eight weeks' notice if 50 to 199 employees have their employment terminated;
- 12 weeks' notice if 200 to 499 employees have their employment terminated; and
- 16 weeks' notice if 500 or more employees have their employment terminated.

Exception to the Mass-Termination Rules

The mass-termination rules don't apply if:

- the number of employees whose employment is terminated within the four-week period is 10 per cent or less than the number of employees who have been employed at the establishment for at least three months;

AND

- none of the terminations were caused by the permanent discontinuance of part of the employer's business at the establishment.

Resignation by an Employee

An employee who has received termination notice under the mass termination rules may wish to resign before the termination date provided in the employer's notice.

In this case, the employee must give the employer at least one week's written notice of resignation if the employee has been employed for less than two years. If the employment period has been two years or more, the employee must give at least two weeks' written notice of resignation.

An employee doesn't have to give notice of resignation if the employer constructively dismisses the employee or breaches a term of the contract.

recall rights

A "recall right" is the right of a terminated employee to be recalled back to work by his or her former employer under a term or condition of employment. This right is commonly found in a collective agreement.

An employee who has recall rights and who is entitled to termination pay because of a layoff of 35 weeks or more may choose to:

- keep his or her recall rights and not be paid the termination pay at that time;

OR

- give up his or her recall rights and receive termination pay.

If an employee is entitled to both termination pay and severance pay, he or she must make the same choice for both.

If an employee who *isn't* represented by a trade union elects to keep his or her recall rights or fails to make a choice, the employer must send the amount of the termination pay (and severance pay, if any) to the Director of Employment Standards, who holds the money in trust.

If an employee who *is* represented by a trade union elects to keep his or her recall rights or fails to make a choice, the employer and the trade union must try to come to an arrangement to hold the termination pay (and severance pay, if any) in trust for the employee.

If they can't come to an arrangement, the employer must send the termination pay (and severance pay, if any) to the Director of Employment Standards, who holds the money in trust.

If an employee chooses to give up his or her recall rights or if the recall rights expire, the money that's held in trust must be sent to the employee.

If the employee accepts a recall back to work, the money that's held in trust will be returned to the employer.

exemptions to notice of termination or termination pay

Many of these exemptions are complex. Please contact the Ministry of Labour if you need help with these exemptions.

The notice of termination and termination pay requirements of the *ESA* don't apply to an employee who:

- is guilty of wilful misconduct, disobedience or wilful neglect of duty that isn't trivial and hasn't been condoned by the employer;
- is free to choose whether or not to work when the employer offers him or her work, and the employee is able to refuse work when it is offered without penalty;
- was hired for a specific length of time or to do a specific task. However, such an employee will be entitled to notice of termination or termination pay if:
 - the employment ends before the term expires or the task is completed; or
 - the term expires or the task isn't completed more than 12 months after the employment started; or
 - the employment continues for three months or more after the term expires or the task is completed.
- is employed in construction – this includes employees who are doing off-site work in whole or in part, and who are commonly associated in work or collective bargaining with employees who work at the construction site;
- builds, alters or repairs certain types of ships (contact the ministry for more information);
- has his or her employment terminated after reaching the retirement age according to the employer's established practice (if employees are allowed to work beyond this age, notice of termination applies);
- has refused an offer of reasonable alternative employment with the employer;
- has refused to exercise his or her right to another position that's available under a seniority system. This usually means the employee gives up the right to displace or "bump" another employee in order to keep working;
- doesn't return to work within a reasonable time after being recalled to work from a temporary layoff;
- is terminated during or as a result of a strike or lockout at the workplace;
- has lost his or her employment because the contract of employment is impossible to perform or has been frustrated by an unexpected or unforeseen event or circumstance (this doesn't include bankruptcy or insolvency) – such as a fire or flood – that makes it impossible for the employer to keep the employee working.

Severance Pay

"Severance pay" is compensation that's paid to a qualified employee who has his or her employment "severed." It compensates an employee for loss of seniority and job-related benefits. It also recognizes an employee's long service.

Severance pay is separate from notice of termination of employment or termination pay.

what is severance of employment?

A person's employment is "severed" when the employer:

- dismisses or stops employing the employee, including an employee who is no longer employed due to the bankruptcy or insolvency of his or her employer;
- "constructively" dismisses the employee and the employee resigns in response within a reasonable time;
- lays the employee off for 35 or more weeks in a period of 52 consecutive weeks;
- lays the employee off because all of the business at an establishment closes permanently (an "establishment" can, in some circumstances, include more than one location); or
- gives the employee written notice of termination and the employee resigns after giving two weeks' written notice, and the resignation takes effect during the statutory notice period.

The following paragraphs will help clarify the preceding points.

Constructive Dismissal

A constructive dismissal occurs when:

- an employer makes a significant change to a fundamental term or condition of an employee's employment without the employee's actual or implied consent;

AND

- the employee resigns within a reasonable time of learning of the change.

A constructive dismissal may occur when an employer significantly reduces an employee's salary or makes a significant change to an employee's work location, hours of work, authority or position. Constructive dismissal may also apply when an employer significantly harasses or abuses an employee or when an employer gives an employee an ultimatum to "quit or be fired."

Constructive dismissal is a complex and difficult subject. An employee who believes he or she has been constructively dismissed should contact the Ministry of Labour for further information.

regular rate

This is an employee's rate of pay for each non-overtime hour of work in the employee's work week.

regular work week

For an employee who usually works the same number of hours every week, a regular work week is a week of that many hours, not including overtime hours.

regular wages

These are wages that don't include all types of pay. Overtime pay, vacation pay, public holiday pay, premium pay, termination pay and severance pay aren't considered "regular wages."



Week of Layoff

For the purposes of the Severance provision, an employee who receives less than one quarter of the wages he or she would have earned at the *regular rate* for a *regular work week* is considered to have been on a week of layoff.

A week of layoff doesn't include a week when the employee is:

- unavailable for work;
- unable to work;
- suspended for disciplinary reasons; or
- not provided with work because of a strike or lockout at his or her place of employment or elsewhere.

Thirty-Five Weeks of Layoff in a Period of 52 Consecutive Weeks

One of the ways an employee's employment can be severed is if the employee is laid off for 35 weeks or more in a period of 52 consecutive weeks.

Although the 52 weeks are consecutive, the 35 weeks are not required to be consecutive.

Here's an example:

Miranda was laid off for 30 weeks and then recalled to work for three weeks. She was then laid off for another five weeks. Because Miranda had been laid off for a total of 35 weeks in a period of 52 consecutive weeks, her employment had been severed.

Employee Resigns After Receiving a Notice of Termination

An employee who has been given a written notice of termination can resign and continue to keep the right to severance pay. To keep this right, the employee must give the employer *two weeks'* written notice of his or her resignation. The resignation must also take effect during the *statutory notice period* – the period of written notice that's required to be given by the employer. (See "Termination of Employment".)

If an employer provides longer notice than is required, the statutory part of the notice period is the last part of the period that ends on the date of termination.

For example, David has worked for seven years, and is entitled to seven weeks' notice of termination under the *ESA*. David's employer gives him 10 weeks' notice. David can give his employer two weeks' written notice of his resignation. As long as David's resignation takes effect during the statutory notice period – which is the last seven weeks of the 10-week notice period – he continues to be entitled to severance pay.

qualifying for severance pay

An employee qualifies for severance pay when his or her employment is severed and he or she:

- has worked for the employer for five or more years;
- AND**
- was employed by an employer who:
 - has a payroll in Ontario of at least \$2.5 million; or
 - severed the employment of 50 or more employees in a six-month period because all or part of the business closed.

Exemptions from Severance Pay

Many of these exemptions are complex. Please contact the Ministry of Labour if you need help with these exemptions.

An employee isn't entitled to severance pay if he or she:

- has refused an offer of "reasonable alternative employment" with the employer;
- has refused "reasonable alternative employment" that's available to the employee through a *seniority system*;
- is severed and retires on a full pension (not including Canada Pension Plan benefits);
- has his or her employment severed because of a strike, as long as the employer can show that the economic effects of the strike caused the closing of part or all of the business;
- is employed in construction, including employees who are working off-site and who are commonly associated in work or collective bargaining with employees who work at the construction site;
- is employed in the on-site maintenance of buildings, structures, roads, sewers, pipelines, mains, tunnels or other works;
- is free to choose whether or not to work when the employer offers him or her work, and the employee is able to refuse work when it is offered, without penalty;
- is guilty of wilful misconduct, disobedience or wilful neglect of duty that isn't trivial and wasn't condoned by the employer (see "Termination of Employment"); or
- has lost his or her employment because the contract of employment is impossible to perform or has been frustrated by an unexpected or unforeseen event or circumstance.

amount of severance pay

To calculate the amount of severance pay an employee is entitled to receive, multiply the employee's *regular wages* for a *regular work week* by the sum of:

- the number of completed years of employment;
- AND**
- the number of completed months of employment divided by 12 for a year that is not completed.

An employee can receive up to 26 weeks of severance pay.

Some employees don't have a regular work week – that is, they don't work the same number of hours every week. Others (e.g., commission people) are paid on a basis other than the hours they work in a week.

For these employees, the *regular wages* for a *regular work week* is the average of the regular wages received in the 12 weeks in which the employee worked immediately before the employment was severed or – if the employment was severed as a result of a layoff – immediately before the layoff began.

Calculating Severance Pay

Here are two examples of how to calculate severance pay.

A regular work week

Arlid regularly works 40 hours a week and is paid \$15.00 an hour. His employer has a payroll of more than \$2.5 million. His employer gives Arlid seven weeks' notice of termination, and Arlid works for the notice period. At the end of the notice period, Arlid's employment is severed. On that date, Arlid has been employed for seven years, nine months and two weeks.

Here's how to calculate Arlid's severance pay entitlement.

1. Calculate Arlid's regular wages for a regular work week.
Arlid usually works 40 hours a week X \$15.00 = \$600.00
2. Number of Arlid's completed years = 7
3. Divide the number of complete months Arlid was employed in the incomplete year by 12
Arlid worked 9 complete months $\div$ 12 = 0.75
4. Add the number arrived at in Step 2 (7) to the number arrived at in Step 3 (0.75)
 $7 + 0.75 = 7.75$
5. Multiply Arlid's regular wages for a regular work week (\$600.00) by the number arrived at in Step 4 (7.75).
 $\$600.00 \times 7.75 = \$4,650.00$.

Result: Arlid is entitled to \$4,650.00 in severance pay.

Paid on a basis other than time worked

Shelby works as a *commission* salesperson at her employer's high-tech retail store, one of the biggest in the city. She is paid commissions on sales made, not on the basis of time worked.

Shelby's employer decides to "downsize" the number of staff, and Shelby is given eight weeks' written notice of termination of employment. She works the notice period, and her employment is severed. On the date her employment is severed, she has been employed for nine years, six months and three weeks.

Shelby's employer has a payroll of more than \$2.5 million. In the last 12 weeks of her employment, Shelby has received \$7,712.00.

To calculate Shelby's severance pay entitlement.

1. Calculate Shelby's "regular wages for a regular work week" – the average of the regular wages she received in the weeks she worked during her last 12 weeks of employment.
 $\$7,723.00 \div 12 = \$643.58$
2. Number of completed years = 9
3. Divide the number of complete months Shelby was employed in the last year she was employed by 12
Shelby worked 6 complete months $\div$ 12 = 0.5
4. Add the number arrived at in Step 2 (9) and the number arrived at in Step 3 (0.5) $9 + 0.5 = 9.5$
5. Multiply Shelby's regular wages for a regular work week (\$643.58) by the number arrived at in Step 4 (9.5)
 $\$643.58 \times 9.5 = \$6,114.01$.

Result: Shelby is entitled to \$6,114.01 in severance pay.

when to pay severance pay

An employee must receive severance pay either seven days after the employee is severed or on what would have been the employee's next regular pay day, whichever is *later*.

However, an employer may pay severance pay in installments with the *written* agreement of the employee or the approval of the Director of Employment Standards, Ministry of Labour. An installment plan can't be for more than three years. If an employer fails to make a scheduled payment, all of the employee's severance pay becomes due immediately.

recall rights

A "recall right" is the right of a severed employee to be recalled back to work by his or her former employer under a term or condition of employment. This right is usually found in a collective agreement.

A severed employee with recall rights may choose to:

- keep his or her recall rights and not be paid the severance pay at that time;
- OR**
- give up his or her recall rights and receive the severance pay.



If an employee is entitled to both termination pay – because of a layoff of 35 weeks or more – and severance pay, he or she must make the same choice for both. (See *Recall Rights* in the chapter on "Termination of Employment" for more information.)

Suppose an employee who *isn't* represented by a trade union chooses to keep his or her recall rights or fails to make a choice. In this case, the employer must send the amount of the severance pay to the Director of Employment Standards, Ministry of Labour, who holds the money in trust.

Suppose an employee who *is* represented by a trade union either chooses to keep his or her recall rights or fails to make a choice. In this instance, the employer and the trade union must try to come to an arrangement to hold the severance pay in trust for the employee. If they can't come to an arrangement, the employer must send the severance pay to the Director of Employment Standards, who holds the money in trust.

If an employee chooses to give up his or her recall rights – or the recall rights expire – the severance pay that's held in trust must be sent to the employee.

If the employee accepts a recall back to work, the money that's held in trust will be returned to the employer.

Continuity of Employment

The purpose of the continuity of employment provisions of the *ESA* is to ensure that an employee retains certain rights when:

- the business the employee works for is sold or transferred in any other way to a new owner; and
- the employee continues to work in the business for the new owner.

It also applies to an employee of a building services provider when:

- the employer no longer holds the contract at the building where the employee works; and
- the employee is hired to work for the new provider at the same location.

rights and provisions

The continuity of employment section provides that a person's *length of employment* with the seller of a business or a previous services provider is attributed – or “flows through” – to the purchaser of the business or the new services provider.

This means that an employee's entitlement to those rights that are based on length of employment is unchanged despite the sale of the business or the change in the provider. These rights include:

- vacations;
- pregnancy and parental leaves;
- notice of termination or termination pay; and
- severance pay entitlements.

building services provider

This is a person or company that provides *cleaning, security, or food services* for a premises. A building services provider can also provide *property management, parking garage, parking lot and concession stand* services related only to the building, its occupants and visitors. A building services provider includes the owner or manager of a building if that owner or manager provides these services to a building that they own or manage.

The *ESA* also has specific provisions that apply *only* to building services providers and their employees. (See “Building Services Providers” for more information.)

How It Works

The following examples show how continuity of employment is applied.

When a business is sold

Fred has worked for 10 years as a mechanic. His employer, Harold, decides to retire and sell the garage to his son, who chooses to continue to employ Fred. Fred wants to carry on working in the business, and he accepts the job with the new owner.

Because Fred's employment doesn't end with the transfer of the business, the length of time he worked for Harold must be recognized for any rights he has that are based on his length of employment.

When part of a business is sold

Kristopher works for a dairy that produces milk and ice cream. The dairy sells the ice cream division so that it can concentrate on milk production. The buyer offers to continue to employ Kristopher, and he agrees to work for the new owner.

Kristopher's employment doesn't end with the sale. The total time Kristopher was employed by the business must be taken into account when determining any rights Kristopher may have with the new employer.

When a building services provider is replaced

Simone has worked for two years for ABC Cleaning. Her employer has a contract with a building owner to provide cleaning services in the owner's building. The contract is for a specific period of time, and when it expires the owner contracts with a new company, DEF Cleaning.

Simone is hired by DEF Cleaning and continues to work in this building. In hiring her, DEF Cleaning must recognize Simone's length of employment with ABC Cleaning for any rights she has that are based on her length of employment.

When a service is contracted to a building services provider

Jim has worked for MNO Insurance for six years as a cleaner. His job is to keep MNO's office building clean. MNO decides to contract this service to a cleaning company, GHI Cleaning. GHI Cleaning chooses to hire Jim, and he continues working in the building.

Jim's length of employment with MNO is included when determining his length of employment with GHI.

determining entitlement to rights and benefits

Most employees are entitled to earn such rights as vacations, pregnancy and parental leaves, termination and severance pay. However, they aren't eligible to receive them until they have worked for an employer for a certain minimum time, which varies according to each kind of right.

When a person's length of employment is attributed to a new employer, the new employer has to recognize the time the person worked for the previous employer. This "earned" time must be credited toward any rights the employee has that are based on his or her length of employment.

Vacation Time and Pay

A person must have been employed for 12 months before he or she is entitled to take a vacation, and it must be taken no later than 10 months after it is earned.

Here are some examples:

When a business is sold

Scott has worked for a business for 16 months when the business is sold. He hasn't taken any vacation at the time of the sale. Scott continues to work for the new owner, and his 16 months of employment with the seller must be recognized by the new owner. The new owner must give Scott his paid vacation within six months.

When a building services provider is replaced

Jean has worked as a cleaner with a company for just over three years. So far, she has taken two weeks of vacation for each of her first two years of employment. Because she has completed a third full year of employment, she is entitled to another two weeks of vacation.



One month before Jean is scheduled to take her vacation, the cleaning company's contract expires. A new services provider takes over the cleaning of the building and hires Jean. Her length of employment must be recognized by the new services provider, and Jean is entitled to her earned vacation time.

Note: A provider who stops providing services at a premises and who stops employing an employee has to pay the employee the amount of any accrued (accumulated) vacation pay:

- *within seven days of the date the provider stops providing services to the premises;*
- OR**
- *on the employee's next pay day;*

whichever is later.

Pregnancy Leave

To qualify for a pregnancy leave, a woman must have started her employment at least 13 weeks before the date her baby is expected to be born. Here are some examples.

When a business is sold

Sophia has worked for an accounting firm for three years. The firm is sold, and Sophia starts working for the new owner. The sale occurred four weeks before Sophia's due date, and she will have started her employment with the new owner only four weeks before her baby is due.

Sophia's employment with the old business is deemed to have been employment with the new owner. She is considered to have started her employment three years and four weeks before her baby is due, and she qualifies for pregnancy leave.

When a building services provider is replaced

Solange has worked for five years in a hospital cafeteria for 123 Foods. Solange is eight months pregnant, and she intends to begin her pregnancy leave on the date her baby is due – in one month's time. However, 123 Foods is replaced by a new services provider, 456 Foods, which hires Solange.

Because 456 Foods must recognize Solange's years of employment with the previous provider, she is considered to have started her employment five years and one month before her due date. Solange is entitled to pregnancy leave.

Parental Leave

To qualify for a parental leave, an employee who is a new parent must have been employed by his or her employer for at least 13 weeks before the leave begins. Here are two examples.

When a business is sold

Melissa, Ellen's same-sex partner, has worked for a printing company for 13 years. Ellen gave birth six months ago. The printing company was sold when the baby was five months old, and Melissa continues to work for the new owner.

Melissa planned to take a parental leave when the baby was seven months old. Her total length of employment with the business is attributed to the new owner. Therefore, her total length of employment is more than 13 weeks, and she is qualified for the parental leave.

When a building services provider is replaced

Mohammed has worked for a security services company as a security guard for three years. His employer provides security services at a local credit union. Mohammed and his wife have a three-month-old son.

Mohammed planned on taking a parental leave when his son was five months old. The security services company was replaced by another company at the end of its contract, one month before Mohammed was planning to begin his parental leave.

Mohammed is hired by the new security services company. He qualifies for parental leave because the new services provider must recognize his total length of employment, which is more than the 13 weeks he needs to qualify under the *ESA*.

Termination of Employment and Severance of Employment

In most cases, when a person's employment is going to be ended by an employer, the employee is usually entitled to receive either written notice of termination or termination pay, or a combination of both. Some employees are also entitled to receive severance pay. The length of the notice or the amount of termination pay or severance pay depends on how long the person has been employed.

Here are two examples:

When a business is sold

Tauleah has worked for a retail chain of stores for 10 years. All of the stores have been sold to a new owner, and the new owner continues to employ Tauleah. Six months after buying the business, the new owner decides to downsize, and Tauleah's employment is ended.

Tauleah's length of employment with the business is attributed to the new owner. Since she was employed with the business for 10½ years, she is entitled to receive the maximum period of written notice or pay in lieu of notice required under the *ESA* – eight weeks.

Because Tauleah was employed with the business for more than five years and her employer's payroll is greater than \$2.5 million annually, she is also entitled to 10½ weeks of severance pay.

When a building services provider is replaced

Yue has worked as a site supervisor for a building cleaning company, ABC Cleaning, for four years. ABC Cleaning's contract expires, and it is taken over by a new services provider, DEF Cleaning. Yue is hired by DEF Cleaning, and works for them for another four years. Then DEF terminates his employment.

Yue is entitled to either eight weeks' written notice of termination of employment or eight weeks' pay in lieu of notice from DEF Cleaning. This is because his length of employment with the previous employer must be recognized by DEF Cleaning.

Yue may also be entitled to severance pay if DEF Cleaning's payroll is more than \$2.5 million or more than 50 employees have their employment ended within a six-month period as a result of a permanent discontinuance of all or part of DEF Cleaning's business at an establishment.

exception: 13-week gap in employment

One exception to the continuity of employment provision is when a 13-week gap in employment occurs. This affects an employee's rights.

Sale of a Business

A person's employment with a previous employer isn't deemed to have been employment with the new owner if the employee is hired by the new owner more than 13 weeks after either the employee's last day of work with the seller or the day of the sale – whichever is earlier.

Here are two examples:

When an employee is hired more than 13 weeks after stopping work with the seller

Bruce works for JKL Taxis, which is having financial difficulties. His employment is ended by the owners and, 10 weeks later, the business is sold to a new owner, MNO Taxis. MNO Taxis doesn't immediately offer to hire Bruce.

After eight weeks, the new owner realizes that he needs more staff. He calls Bruce and asks him to return to his old job. Bruce does, but his employment with the previous owner isn't attributed to MNO Taxis because he was hired more than 13 weeks after his last day of employment with the previous owner.

When an employee is hired more than 13 weeks after the day of the sale

Brian works as the manager at Charlie's Restaurant. The owner agrees to sell the business, and Brian works until the date the restaurant is sold. The new owner decides to manage the restaurant herself and doesn't hire Brian.

After four months – 16 weeks – the owner realizes that she isn't able to manage the restaurant as well as Brian did, and she asks him to return to his job as manager. Brian agrees, and he starts working again in the business.

Brian's employment with the previous owner isn't deemed to have been employment with the new owner because he was hired back more than 13 weeks after the date of the sale of the business.

Change of Building Services Providers

A person's employment with a previous services provider isn't deemed to have been employment with the new provider if the employee is hired by the new provider more than 13 weeks after either the employee's last day of work with the previous provider or the day the new provider began to provide the services – whichever is earlier.

Here are two examples:

When an employee is hired more than 13 weeks after employment was ended

Maidi has worked for four years as a parking garage attendant for RST, a building services provider.



RST cuts back on its staff and terminates Maidi's employment with proper written notice. Three weeks after her termination, a new building services provider takes over the operation of the parking garage. Three months later, the new provider hires Maidi to work as an attendant at the same parking garage.

Maidi's employment with RST isn't deemed to have been employment with the new services provider because there was a gap of more than 13 weeks between the date her employment was terminated by RST and the date she was hired by the new provider.

When an employee is hired more than 13 weeks after a new provider takes over

Michel works as a car jockey at a parking lot operated by the owner of an office building. Because the owner provides parking lot services to the building that it owns, it is considered to be a building services provider.

The owner decides that it wants to contract the operation of the parking lot to TUV, a building services provider. Michel has been employed by the building owner for three years. He is given three weeks' written notice of termination of his employment by the owner.

Michel's last day of work coincides with the last day the lot is operated by the building owner. The next day the new building services provider, TUV, takes over the operation.

TUV doesn't immediately offer to hire Michel. However, six months later, it hires him to work as a car jockey.

Michel's employment with the building owner isn't attributed to TUV because he was hired more than 13 weeks after his first day of employment with the owner (who was the previous building services provider).

special circumstances

Please contact your local Ministry of Labour office for further information about any of the following circumstances:

- when a business has been taken over by a landlord due to non-payment of rent;
- when a business has been taken over by a trustee or receiver due to a bankruptcy or receivership; and
- when a business is a franchise operation.

Building Services Providers

As well as the continuity of employment provisions already discussed, additional provisions of the *ESA* apply *only* to employers and employees in the building-services-provider sector.

A building services provider is a person or company which provides cleaning, security or food services for a premises. A provider can also offer property management, parking garage, parking lot and concession stand services related only to a building, its occupants and visitors.

The owner or manager of a building is considered a building services provider if that owner or manager provides these services to a building that they own or manage.

termination and severance of employment

If a building services provider is replaced by a new provider, the new provider may decide not to hire employees of the former provider. However, the new provider must comply with Part XV (Termination and Severance of Employment) of the *ESA* as if these employees had been terminated and/or severed by the new provider.

Here's an example of how this works:

Bushra has worked for ABC Foods for 10 years as a cook in a cafeteria. The company has a contract to provide food services in an office building. When the contract expires, DEF Foods is contracted to provide the food services. DEF Foods has its own staff and doesn't hire Bushra.

DEF Foods is responsible for paying Bushra's termination pay and her severance pay (if applicable), even though she wasn't employed by DEF Foods. Bushra is entitled to eight weeks' pay in lieu of notice plus, if she is entitled to severance pay, 10 weeks of severance pay. These payments are based on the length of time she was employed with ABC Foods.

A new building services provider doesn't have to provide termination or severance pay to an employee:

1. who continues to work for the previous provider;
2. whose work with the previous provider included providing services at the premises but who didn't perform his or her job primarily at those premises during the 13 weeks before the date the new provider began to provide services;
3. whose work included providing services at the premises but who –
 - wasn't actively at work immediately before the date the new provider began to provide services; and
 - didn't perform his or her job primarily at the premises during the most recent 13 weeks he or she was actively employed;
4. who didn't perform his or her job at the premises for at least 13 weeks during the 26-week period before the new provider began to provide services (this doesn't include any time the employee was on pregnancy, parental or emergency leave, or time the building services weren't being provided); or
5. who refuses an offer of employment with the new provider that's reasonable in the circumstances.

If exemption 2, 3, 4 or 5 applies, the employee is still entitled to termination and/or severance pay from the previous provider.

providing information

When a building services provider is considering becoming a new provider of services at a building, it can ask the building's owner or manager for certain information about the employees who are working for the current services provider. This information can help the potential new provider decide whether, and on what terms, to make a bid to take over the provision of the services, and the number of employees – if any – it will retain if it wins the contract.

A potential new provider can ask for information on:

- each employee's job classification or job description;
- the wage rate actually paid to each employee;
- a description of any benefits provided to each employee, including the cost of each benefit and the benefit period to which the cost relates;
- the number of hours each employee works in a regular work day and in a regular work week;
- the date each employee was hired by the provider;
- any period of employment attributed to the current or former provider because of the continuity of employment provisions of the *ESA*;
- the number of weeks each employee worked at the premises in the 26 weeks before the request for more information was made (not including any period during which the provision of services was temporarily discontinued or during which the employee was on a pregnancy, parental or emergency leave);
- a statement indicating whether either of the following paragraphs applies to each employee –
 - the employee's work before the date the request was made included providing services at the premises, but the employee *didn't* perform his or her job *primarily at those premises* during the 13 weeks before the request was made;
 - the employee's work included providing services at the premises, but the employee *wasn't actively at work* immediately before the date the request was made, and the employee *didn't* perform his or her job *primarily at the premises* during the most recent 13 weeks of active employment.

Once a building services provider is awarded the contract and becomes the new provider of the services at a building, it has the right to ask for the name, residential address and telephone number of each employee, in addition to the information listed here.

If a building owner or manager receives a request for information from a new or potential new services provider, it has the right to get the necessary information from the current or former services provider.

If an employee's hours of work vary from week to week, the owner or manager must provide the number of the employee's non-overtime hours for each week that the employee worked during the 13 weeks before the date the request was made.

Anyone who receives information about employees under this provision must use it only for the purposes outlined here, and must ensure that the information remains confidential.

Equal Pay for Equal Work

Ontario has legislation called the *Pay Equity Act* to ensure that women and men receive equal pay for work of *equal value*.

There are also provisions in the *ESA* that ensure women and men receive equal pay when doing *substantially the same work, requiring the same skill, effort and responsibility and performed under similar working conditions in the same establishment*.

According to the *ESA*, a woman can't be paid less than a man if she is doing "equal work." This also applies in reverse – a man can't receive less pay than a woman if he is doing "equal work."

Substantially the Same Work

This means that the work is similar enough that it could reasonably be considered to fall within the same job classification. The jobs don't have to be identical in every respect, nor do they have to be interchangeable.

Substantially the Same Skill, Effort and Responsibility

Skill refers to the degree or amount of knowledge or physical or motor capability needed by the worker performing the job.

Effort is the physical or mental exertion needed to perform a job.

Responsibility is measured by the number and nature of a worker's job obligations, the degree of accountability and the degree of authority exercised by a worker in the performance of the job.

similar working conditions

Working conditions refer to such things as exposure to the elements, health and safety hazards, workplace environment, hours of work and any other terms or conditions of employment.

The Same Establishment

This means a location where the employer carries on business. Two or more locations are considered a single establishment if:

- they are in the same municipality; or
- there are common "bumping rights" for at least one employee across municipal borders.

The following examples show how these provisions of the *ESA* are applied.

When two people do substantially the same work

Andy and Kyra both work on a production line. Kyra packs plastic spoons into small boxes, and Andy packs the small boxes into bigger boxes. There isn't anything about either of these jobs that requires more skill, effort or responsibility.

Andy and Kyra are doing substantially the same work, and they must be paid the same wages (unless one of the exceptions listed below applies).

When a business has two locations

An employer owns two clothing stores in the same city. One sells women's clothes, and the staff are women. The other sells men's clothes, and the staff are men. The two stores are considered one establishment under the *ESA*, because they are in the same municipality.

Since the staff in both stores do substantially the same work – selling clothes – everyone should receive the same pay.

If employees haven't been paid equal pay for equal work, steps must be taken to change this. Employers must raise wages to achieve equal pay. They *can't* lower wages to achieve equal pay.

exceptions

If a man and a woman are doing substantially the same work, they can be paid different rates of pay if the difference is due to:

- *A seniority system.* Under an established seniority system, the time an employee has worked for an employer is credited. This can be used to justify paying a more senior employee a higher wage than a less experienced employee.
- *A merit system.* An employee can be paid more money or a bonus based on a system that measures the work performance of the employees objectively.
- *A piecework system.* An employer may have a system that measures higher quality or quantity of work. If this is the case, an employee can be paid a higher rate for producing more work or better quality work if the system is applied equally to both sexes.
- *Any difference that isn't based on the gender of the employee.* For example, an employee can receive more money for working at night. Or an employee can be paid more while participating in a well-defined training program that has as its goal the advancement of the employee within the organization.



Lie Detector Tests

A "lie detector test" means an analysis, examination, interrogation or test that is taken or performed by means of a machine and is used to assess a person's credibility.

prohibition of testing

Employers are prohibited from using lie detectors to screen employees. No one can directly or indirectly require, request, enable or influence an employee to take a lie detector test.

an employee's right to refuse

An employee, as defined in the box "Employer and Employee," has the right:

- not to take a lie detector test;
- not to be asked to take a lie detector test; and
- not to be required to take a lie detector test.

"employer" and "employee"

For the purposes of the lie detector provisions of the *ESA*:

- an "employer" also includes a prospective employer and a police governing body;
- an "employee" also includes an applicant for employment, a police officer and a person who is applying to be a police officer.

Disclosure

No one can disclose to an employer that an employee has taken a lie detector test, and no one can disclose to an employer the results of a lie detector test taken by an employee.

use of lie detectors by the police

Nothing in this part of the *ESA* prevents a person from:

- being asked by a police officer to take a lie detector test;
- consenting to take a lie detector test; and
- taking a lie detector test;

if the test is administered on behalf of a police force in Ontario or by a member of a police force in Ontario in the course of the investigation of an offence.

powers of an employment standards officer

If an employment standards officer finds that this part of the *ESA* has been contravened, the officer can order the reinstatement of an employee.

If there is a contravention involving an applicant for employment or an applicant to be a police officer, an employment standards officer can order the employer to hire the applicant.

The officer can also order that the person be compensated by the employer for losses suffered because of the contravention.

How to File a Claim

If an employee believes that his or her employer or former employer hasn't followed the *ESA*, the employee is encouraged to discuss the matter with the employer or with a union representative, if there is one.

The employee may also choose to send the employer a *registered* letter explaining the problem and asking to have it resolved. The employee should keep a copy of the letter and the mailing receipt. If the employee needs help writing the letter, he or she can contact the Ministry of Labour for assistance.

Talking to the employer or sending a registered letter isn't always the most useful or practical way of dealing with a problem. Sometimes it's better to contact the Ministry of Labour directly, either in person or by telephone, to discuss the situation.

After such a discussion, the employment standards person may recommend that the employee file a claim with the ministry – a form that contains a written statement of the employee's concerns as well as other important information about the employer and the employee's claim.

when an employee can't file a claim

There are two situations in which an employee can't file a claim.

- Generally speaking, employees represented by a union can't file a claim with the ministry. If an employee is represented by a trade union and is covered by a collective agreement (whether or not the employee is actually a *member* of the union), the employee must consult the union representative if he or she believes the *ESA* hasn't been followed.

In this case, the employee's claim *may be* pursued through the grievance procedure contained in the collective agreement between the employer and the trade union.

- If an employee has already started a *court action* against the employer for the failure to pay wages or for discrimination in benefit plans, the employee can't file a claim with the ministry for the same matter. In addition, an employee who has started a court action for wrongful dismissal can't file a claim for termination or severance pay under the *ESA* for the same termination.

filing a claim

To file a claim, an employee must complete a claim form which can be obtained from a Ministry of Labour office.

The employee can visit the nearest ministry office when he or she is filing the claim. This gives the employee the chance to get information from an experienced person, as well as assistance in filling out the form.

What's Needed to File the Claim

An employee needs to provide certain information when filing a claim. This includes information about the employer and details of the employee's employment.

The employee will be asked to provide some or all of the following information:

- Social Insurance Number;
- copies of pay stubs or paycheques;
- copies of T4 slips;
- a copy of his or her written notice of termination (if the employee's employment was terminated and/or severed by the employer), if received;

- a copy of the employee's Record of Employment, if received;
- a copy of the written contract of employment, if there is one;
- copies of any warning letters or notices received; and
- a record of the hours worked (for example, a calendar record, time sheets, attendance records, diary or notes).

When completing the claim form, the employee must give details about:

- what happened (for example, the employer didn't pay overtime; a cheque "bounced"; the employee was let go);
- when it happened (dates and times);
- why it happened (for example, why the employee was let go; why the employer didn't pay wages);
- who was involved (for example, names of employer, manager, supervisor, bookkeeper);
- any witnesses or others who would support the employee's story;
- what's being claimed (including dollar amounts, if applicable); and
- how the employee tried to solve the problem with the employer (if the employee wrote to the employer, a copy of the registered letter and mailing receipt).

In addition, the employee will be asked to give information about the employer, such as:

- the employer's full address and telephone numbers;
- the employer's bank (what bank the employee's cheques were drawn on);
- whether the employer is still operating; and
- whether the employer operates any other place of business.

An employee can't file an unsigned claim. If the employee doesn't want the ministry to use his or her name or address during the investigation, this should be discussed with an employment standards person when the employee files the claim.

maximum amount of money that can be claimed

With some exceptions, \$10,000.00 is the maximum amount the Ministry of Labour can order an employer to pay an employee.

However, this limit doesn't apply to claims under those parts of the *ESA* in which reinstatement and/or compensation can be ordered (for example, parts dealing with pregnancy and parental leave; the right of an employee not to be penalized for exercising his or her rights under the *ESA*; or a retail employee's right to refuse to work a public holiday).

time limits regarding claims

There are two different time limits which affect an employee's right to a remedy under the *ESA*.

six-month/one-year time limit for recovering wages

In most cases, in order to recover wages, an employee must file a written claim with the ministry within six months of the date when the employee's wages become due.

Generally, wages become "due" to an employee on the employee's regular pay day. However, if the employee's employment is terminated by the employer, all the money that the employer owes to the employee has to be paid *either* within seven days after the employee was terminated *or* on the employee's next regular pay day, whichever is later.

If, after beginning the investigation, an employment standards officer finds that:

- an employer has repeatedly violated the same section of the *ESA*;
- AND**
- at least one of the violations occurred in the six months before the claim was filed;

the employee is entitled to recover all wages due for the repeated violations of the same section of the *ESA* in the 12 months before the complaint was filed.

Here are two examples of how this works.

When more than six months have elapsed

Nhan was employed as a technician for just over three years. His employment was terminated because of shortage of work on February 1, without written notice or termination pay. On August 30 he went to the local office of the Ministry of Labour to file a claim for three weeks' termination pay.

Nhan isn't able to recover his termination pay because the pay became due to him more than six months before the date he filed his claim.

When there are repeated violations

Jenny was employed in a restaurant for just over one year and wasn't paid for public holidays. She quit her job and filed a claim with the ministry on January 5. In the six months before her complaint was filed, Jenny should have been paid public holiday pay for Labour Day, Thanksgiving Day, Christmas Day and New Year's Day.

The employer repeatedly violated the public holiday sections of the *ESA* by not paying Jenny public holiday pay and at least one violation of the public holiday provisions occurred within six months of the date Jenny filed her claim.

Because of this, the employment standards investigation isn't limited to recovering wages that became due in the six-month period before the date her claim was filed (January 5). It will be extended to recover wages that became due to Jenny within 12 months from the date she filed her claim. As a result, Jenny is also entitled to public holiday pay for Canada Day, Victoria Day and Good Friday.

two-year time limit for filing a claim

In some circumstances, an employee can file a claim up to *two years* after the date on which an employer contravened the *ESA*.

This includes situations where an employer has violated the provisions dealing with leaves of absence, lie detectors, retail business establishments, and reprisals. Reprisals include situations where an employer has penalized or threatened to penalize an employee for exercising his or her rights under the *ESA*, including:

- asking the employer to comply with the *ESA*;
- asking questions about his or her rights under the *ESA*;
- filing a complaint under the *ESA*;
- exercising or trying to exercise a right under the *ESA*;
- giving information to an employment standards officer;
- taking, planning to take, or will be eligible to take a pregnancy, parental or emergency leave;
- being the subject of a garnishment order;
- participating in a proceeding under the *ESA* or section 4 of the *Retail Business Holidays Act*;

The two-year limit for filing a claim also applies where the employee believes an employer contravened a *non-monetary* section of the *ESA*. For example, the employer didn't give proper meal breaks or failed to provide wage statements.

filing a claim or going to court

An employee can't file a claim with the Ministry of Labour for a failure to pay wages or discrimination in benefit plans *and* also go to court against the employer for the same matter.

An employee can't file a claim for termination or severance pay *and* also sue an employer for wrongful dismissal for the same termination of employment.

If an employee decides to start a court action *after* filing a claim with the ministry, the employee must withdraw his or her claim with the ministry within two weeks of the date of filing it. This applies even if the employee's claim is for more than the \$10,000.00 maximum wages that an employer can be ordered to pay.

If an employee has any questions about whether to sue the employer in court or file a claim, he or she may wish to consult a lawyer *before* filing a claim.



investigation, enforcement and appeals

Once a claim has been filed, it's assigned to an employment standards officer for investigation. (For details about: how an investigation is conducted; the kinds of actions an employment standards officer or the ministry can take; and how an employee can appeal an officer's decision, see "Role of the Ministry of Labour".)

Role of the Ministry of Labour

The Ontario Ministry of Labour administers the *ESA* and the regulations.

voluntary compliance

One of the ministry's goals is to promote voluntary compliance with the *ESA*. To this end, the ministry provides a wide range of information materials and services to help employers and employees understand their rights and obligations. They include:

- free and "at-cost" publications;
- a fax-on-demand system;
- a toll-free call centre;
- an extensive Internet website;
- local ministry offices across the province; and
- government information centres.

Staff in the Employment Standards Program conduct educational seminars and workshops for groups of employers, employees and professional associations.

They also conduct proactive inspections of payroll records and workplace practices. During these inspections, they ensure that the legislation is being complied with, and they also help employers to understand their rights and responsibilities.

investigating compliance

The ministry also investigates and resolves complaints.

The ministry usually begins an investigation in response to a written complaint, on approved forms, from an employee, a former employee or a group of employees. The ministry also undertakes inspections on its own initiative.

Employees who are covered by a collective agreement (whether a member of a trade union or not) must pursue complaints through the grievance process that is set out in their collective agreement.

six-month/one-year time limit for recovering wages

In most cases, an employee must file a written claim with the ministry within six months of the date when wages became due to the employee in order to recover those wages – through an employment standards officer.

Generally, wages become "due" to an employee on the employee's regular pay day. However, if the employee's employment is terminated by the employer, all the money that the employer owes to the employee has to be paid *either* within seven days after the employee was terminated *or* on the employee's next regular pay day, whichever is later.

If, after beginning the investigation, an employment standards officer finds that:

- an employer has repeatedly violated the same section of the *ESA*;
- AND**
- at least one of the violations occurred in the six-month period before the claim was filed;

the employee will be entitled to recover all the wages due for the repeated violations in the 12 months before the complaint was filed.

Here are two examples of how this works.

When more than six months have elapsed

Nhan is employed as a technician for just over three years. His employment is terminated on February 1, because of shortage of work, without written notice or termination pay. On August 30 he goes to the local office of the Ministry of Labour to file a claim for three weeks' termination pay.

Nhan isn't able to recover his termination pay because it became due to him more than six months before the date he filed his claim.

When there are repeated violations

Jenny was employed in a restaurant for just over one year and wasn't paid for public holidays. She quit her job and filed a claim with the ministry on January 5. In the six months before her complaint was filed, Jenny should have been paid public holiday pay for Labour Day, Thanksgiving Day, Christmas Day and New Year's Day.

The employer repeatedly violated the public holiday sections of the *ESA* by not paying Jenny public holiday pay, and at least one violation of the public holiday provisions occurred within six months of the date Jenny filed her claim.

Because of this, the employment standards officer may issue an order to recover wages that became due to Jenny within 12 months immediately before the date she filed her claim (January 5). As a result, Jenny is also entitled to public holiday pay for Canada Day, Victoria Day and Good Friday.

If the ministry conducts an inspection on its own initiative, and an employment standards officer finds that:

- an employer has repeatedly violated the same section of the *ESA*;
- AND**
- at least one of the violations occurred in the six months before the inspection began;

the employee will be entitled to recover all wages due for the repeated violations of the same section of the *ESA* in the 12 months before the inspection began.

two-year time limit for filing a claim

In some circumstances, an employee can file a claim up to two years after the date on which an employer contravened the *ESA*.

This includes situations where an employer has penalized or threatened to penalize an employee for exercising his or her rights under the *ESA*. (See *Prohibition Against Reprisals* later in this chapter.)

It also applies if the contravention relates to employee rights under the Retail Worker and Lie Detector parts of the *ESA*, or where there has been a *non-monetary* violation (for example, the employer doesn't give proper meal breaks, or fails to give wage statements).

the investigative process

When an employee files a complaint, in most cases a formal investigation isn't begun immediately. Instead, ministry staff encourage the employee to resolve the issue directly with the employer. The staff help the employee identify and define issues, as well as suggesting ways the employee can try to resolve the issue with the employer.

If no resolution is reached, ministry staff inform the employer that the complaint has been filed, and suggest that the employer take steps to resolve the situation.

If the issue can't be resolved, the file is then assigned to an employment standards officer for a full investigation.

During an investigation, the employer and the employee both have the opportunity to present the facts and arguments they believe are relevant to their case. As well, the employer or the employee may be asked to provide the officer with documents and records.

The officer may conduct an investigation by telephone, through written correspondence, by visiting the employer's premises or by requiring both the employee and the employer to attend a *fact-finding* meeting.

Fact-Finding Meetings

A fact-finding meeting gives the parties an opportunity to present their cases to the employment standards officer in person. This is an effective and proven way of resolving issues quickly and fairly.

Before a fact-finding meeting is held, the employer and/or the employee is served with a formal notice of the meeting. This notice sets out the time, date and place of the meeting. The employee and the employer – or a representative of the employer if the employer is a corporation – are *required* to attend the fact-finding meeting. The notice may also require the parties to provide certain documents and records to the officer either before or at the meeting.

The employer and the employee are welcome to bring along any other documents or information they believe will support their case. They are also allowed to bring their lawyer or someone else who is acting on their behalf. If the employer or the employee would like to bring witnesses, it's advisable to contact the officer before the meeting.

At the meeting, the officer will have the employee state his or her concerns. The officer will also ask the parties to produce the information that was requested in the meeting notice. Both parties will be asked questions, and will have the opportunity to state their case and show whatever evidence they believe is relevant.

In many cases, the officer is able to give a decision at the end of the fact-finding meeting. This allows both parties to discuss how the matter will be resolved with the officer. In other cases, the officer may need further information before making a final decision.

If an employer or an employee fails to attend a fact-finding meeting without good reason, the officer may make a determination based on the evidence presented at or before the meeting.

proactive inspections

Employment standards officers also conduct proactive inspections of payroll and other records, including a review of employment practices. Employers are usually selected at random, and these inspections aren't normally initiated through an employee's formal complaint.

An officer conducting a proactive inspection will usually visit the employer's premises. The officer may notify the employer in writing before the time of the inspection. This notification may include a list of records and other documents the employer must provide at the inspection. The employer is required to produce the records requested and must, if asked, help the officer interpret them.

An officer is also permitted to conduct a proactive inspection without giving the employer any advance notice.

At the inspection, the officer conducts an audit of payroll and other employment records, as well as reviewing employment practices. The employer is welcome to ask any questions, and can ask to be supplied with further information.

As part of the inspection, or if the audit is part of an ongoing investigation, the officer is permitted to take away records or other information for review and copying.

If, during an inspection, the officer believes the *ESA* has been contravened, he or she can require the employer to attend a fact-finding meeting.

officer's decision

After an employment standards officer has reviewed all of the evidence gathered during an investigation or inspection, he or she makes a decision. The decision may be that the employer has complied with the *ESA*, or it may be that a contravention has occurred.

If the officer finds that the employer has contravened the *ESA*, the employer has the opportunity to resolve the issue by voluntarily complying with the officer's decision. This may mean that the employer will have to pay money that's owing to an employee or employees. It could also mean that the employer must change a workplace practice or adopt a new workplace practice.

In cases where an employee has filed a claim with the ministry and the officer doesn't find a contravention, the employee is notified of this decision in writing. The employee has the right to apply for a review of the decision within 30 days.

An employment standards officer can also require an employer to post a *notice* containing specific information about the administration or enforcement of the *ESA*.

The employer may also be required to post a copy of the officer's report, with the results of his or her investigation or inspection.

enforcing a decision

If an employer is unwilling or unable to comply with an officer's decision, the officer can issue an order to pay wages to an employee or employees, a compliance order, a notice of contravention or, for certain violations, an order to reinstate and/or compensate an employee.

These orders and the notice of contravention aren't mutually exclusive, and an officer can issue one or more of these orders and/or a notice of contravention in the course of an investigation or inspection.

Order to Pay Wages

An order to pay wages is issued and served on an employer for wages owed to an employee or employees when an employer has refused or is unable to pay money found owing (except when there has been a bankruptcy).

The employer must comply with the order according to its terms or appeal the order within 30 days of the date the order is served. The order also requires the employer to pay an administrative fee of 10 per cent of the money that's owing or \$100.00, whichever is greater.

An order to pay wages can't exceed \$10,000.00 in wages for each employee covered by the order.

Here's an example:

Order for wages for more than one employee

Lisa was working as graphic artist at a new company with five employees. She worked for four months and then quit her job. Lisa had worked a lot of overtime in the four months she was employed but wasn't paid overtime pay. She had spoken to her employer about being paid overtime but was refused.

Shortly after quitting her job, Lisa filed a claim with the ministry for her overtime pay. Her file was assigned to an employment standards officer for investigation.

The officer determined that Lisa and the other four employees were entitled to overtime pay going back five months – to the date the company started operation. Specifically, the officer found that the employer owed the five employees \$15,647.87 in overtime, plus \$625.91 vacation pay on the overtime, for a total of \$16,273.78.

The employer refused to voluntarily pay the money the officer found owing. The officer issued and served an order to pay wages on the employer on behalf of Lisa and the other employees. The amount of the order was \$16,273.78, plus a 10 per cent administrative fee of \$1,627.38. Lisa and the other employees were notified in writing of the officer's findings.

compliance order

An officer can also issue a compliance order if the officer finds that the employer has contravened the *ESA*. The officer can order an employer or other person to stop the contravention and to take certain actions or stop taking certain actions. The order may also specify a date by which the employer or other person must comply with the order.

Here's an example.

Compliance order in addition to order to pay wages

While investigating Lisa's claim for overtime pay, the employment standards officer discovered the employer wasn't giving the five employees proper meal breaks of at least 30 minutes after every five consecutive hours of work. Also, the employer hadn't posted the "What You Should Know About the Ontario *Employment Standards Act*" poster as required under the *ESA*.

In addition to the order to pay wages, the officer issued and served on the employer a compliance order directing it to: comply with the overtime provisions of the *ESA*; ensure that employees would receive their proper meal breaks; post the material required by the *ESA*; and post a copy of the compliance order in a conspicuous place at the workplace for six months.

Notice of Contravention

Employment standards officers have the power to issue notices of contravention with prescribed penalties when they believe someone has contravened a provision of the *ESA*. The penalty amount (payable to the "Minister of Finance") must be paid *within 30 days* of the date the notice was issued, or the notice must be appealed *within 30 days* of the date it was served.

If an employer has contravened the mandatory posting requirements of the *ESA*, or has failed to keep proper payroll records or to keep these records readily available for inspection by an employment standards officer, an officer can serve a notice of contravention with the following prescribed penalties:

- \$250.00 for a first contravention;
- \$500.00 for a second contravention in a three-year period; and
- \$1,000.00 for a third contravention in a three-year period.

If an employer is found in contravention of *any other* provision of the *ESA*, the penalties prescribed are:

- \$250.00 for a first contravention multiplied by the number of employees affected;
- \$500.00 for a second contravention in a three-year period multiplied by the number of employees affected; and
- \$1,000.00 for a third contravention in a three-year period multiplied by the number of employees affected.



Here's an example:

When there are further violations

Six weeks after serving the compliance order on Lisa's former employer, the officer revisited the employer and conducted a further audit. The officer found that the employer was now paying overtime to all employees and had posted a copy of the compliance order. However, the employer hadn't posted a copy of the ESA poster and hadn't ensured that its five employees received proper meal breaks.

As a result, the officer issued and served a notice of contravention on the employer. This set out the officer's belief that the employer had failed to make the required posting (\$250.00 penalty) and had failed to give proper meal breaks to five employees (five times the \$250.00 penalty), for a total of \$1,500.00 in penalties.

The officer also informed the employer that further violations could result in further notices of contravention being issued and/or prosecution by the ministry.

Order to Compensate and/or Reinstate

In the case of some violations, an officer can make an order requiring an employer to *reinstate* or *compensate* an employee – or both. These violations include rights related to:

- pregnancy, parental and emergency leave;
- lie detectors;
- the right to refuse Sunday work for retail workers; and
- an employee being free from any form of reprisal for exercising his or her rights under the ESA.

Unlike an order to pay wages, an order to pay compensation isn't limited to a maximum of \$10,000.00. The officer can order compensation in the amount he or she finds owing to the employee.

review of an officer's decision

Employers and employees who have a right to apply for a review must complete an Application for Review, setting out the facts and reasons for the application. This must be submitted – *within 30 days* of the date of *service* of an order, or letter advising of the order, or notice of contravention, or within 30 days of the date of service of the letter advising of the officer's *refusal* to issue an order or notice of contravention – to:

The Registrar
Ontario Labour Relations Board
505 University Avenue
2nd Floor
Toronto, ON M5G 2P1

When An Employee Can File an Application for Review

An employee who files a complaint can appeal an officer's *refusal to issue* an order to pay for wages, an order to pay compensation and/or reinstate or a compliance order.

If an order has been issued for an employee (whether or not he or she filed a complaint), the employee can appeal the *amount* of an officer's order to pay wages or order to pay compensation and/or reinstate.

When an Employer Can File an Application for Review

An employer can apply for a review of:

- a *compliance order* – because these orders don't require that wages or compensation be paid, the employer doesn't have to pay any money in order to apply for a review;
- a *notice of contravention* – the employer doesn't have to pay the amount of the penalty in order to apply for a review;
- an *order to pay wages* – before a review is granted, the employer must pay the full amount of the order, plus the administrative fees; and
- an *order to pay compensation and/or reinstate* – before a review is granted, the employer must pay the amount of the order up to a maximum of \$10,000.00.

Payments must be made to the "Director of Employment Standards in trust" within 30 days of service of the order. It should be made by cheque, money order or letter of credit. A letter of credit must be in a form that's acceptable to the Director of Employment Standards. That is, it must:

- contain no conditions;
- expire no less than one year from the date it is issued;
- be prepared by a major Canadian bank;
- be for an amount that is five per cent greater than the order, to allow for accrued (accumulated) interest; and
- name the Director of Employment Standards as the beneficiary.

The payment should be forwarded to:

Director of Employment Standards
Ministry of Labour
400 University Avenue
9th Floor
Toronto, ON M7A 1T7

The ministry will issue a proof of payment to the employer, and will hold the money in trust.

how to get an application for review form

Contact:

- any Ministry of Labour office
- the ministry's fax-back system at 416-326-6546
- Ontario Labour Relations Board
505 University Avenue, 2nd Floor
Toronto, ON M5G 2P1
Tel: 416-326-7500
Fax: 416-326-7531
www.gov.on.ca/lab/olrb/home.htm



your employment standards act



the review process

When a request for a review is received, an officer of the Ontario Labour Relations Board (the "Board") will sometimes schedule a mediation meeting with the parties. (No mediation meeting takes place in the case of a notice of contravention.) If the matter is settled at this meeting, the minutes of the settlement are drawn up and signed off by the parties.

If the matter isn't settled, or there hasn't been an attempt at mediation, a hearing is scheduled. The parties have a right to appear at the hearing, present their information in full and explain why they think the employment standards officer was right or wrong.

The Board can amend, overturn or uphold the employment standards officer's order or a notice of contravention. The Board can also issue a new order.

After reviewing an employment standards officer's *refusal* to issue an order, the Board may issue an order or uphold the officer's refusal.

The Board's decisions are final and binding. Although an employer or employee may apply to Divisional Court for a Judicial Review, usually the court won't interfere with a decision as long as it meets a test of "reasonableness."

collections

If an employer doesn't apply for a review within 30 days of the date the order was served or the notice of contravention was issued, the order or notice is final and binding on the employer. If the employer hasn't paid the amount required to be paid, the Director of Employment Standards forwards the file to a private collection agency.

The Director may authorize the collection agency to collect a reasonable fee and/or costs from the employer. Once a file is sent to a collection agency the employer must pay the collection agency fees and the ministry's administrative fees.

prohibition against reprisals

Employers are prohibited from penalizing employees *in any way* for:

- asking their employer to comply with the *ESA*;
- asking questions about the *ESA*;
- filing a complaint under the *ESA*;
- exercising or trying to exercise a right under the *ESA*;
- giving information to an employment standards officer;
- taking, planning on taking, being eligible to take or being due to become eligible to take a pregnancy, parental or emergency leave;
- being subject to a garnishment order; or
- participating in a proceeding under the *ESA* or section 4 of the *Retail Business Holidays Act*.

If an employer penalizes an employee for any of the above reasons, an employment standards officer has the power to order an employer to:

- reinstate an employee to his or her job;

AND/OR

- compensate an employee for any loss incurred because of the contravention;

AND/OR

- pay the employee any wages that may be owing.

An employer may also be prosecuted and ordered to pay a fine and/or imprisoned for contravening an employee's rights under this section. A court may require the employer to take or refrain from taking action to remedy the contravention.

Here's an example of how this might work.

When an employer contravenes an employee's rights

Jeremy is employed as a helper at Collette's bakery. Jeremy and his employer don't have a written agreement that Jeremy will work more than 48 hours a week (the weekly maximum under the *ESA* when the employer and employee don't have an agreement in writing).

Collette asks Jeremy to work more than the maximum hours a week. Jeremy reminds Collette that under the *ESA* he isn't required to work more than 48 hours a week. Collette becomes quite upset and terminates Jeremy's employment and refuses to pay his last week's wages. Jeremy files a claim with the Ministry of Labour.

After an investigation, an employment standards officer finds that Collette penalized Jeremy for exercising his right not to have to work more than 48 hours a week.

Because Jeremy wants to go back to work at the bakery, the officer orders Collette to reinstate Jeremy to his job and to compensate him for the wages and vacation pay he would have earned between the date he was terminated and the date he was reinstated. The officer also orders the employer to pay Jeremy the last week of wages he earned before he was terminated.

offences and prosecutions

It is an offence for an employer or other person to:

- make, keep or produce false records or other documents that must be kept under the *ESA*;
- OR**
- provide false or misleading information under the *ESA*.



Also, any contravention of the *ESA* or the regulations, or failure to comply with an order, direction or other requirement under the *ESA* or regulations is an offence under the *ESA*. Offences may lead to prosecution, fines or imprisonment under the *ESA*.

The Ministry of Labour may choose to prosecute an employer or any other person who is in contravention of the *ESA*. An employer or person who isn't a corporation, if convicted of an offence, can be fined up to \$50,000.00 or imprisoned for up to 12 months, or both.

An employer or person who is a corporation can be fined up to \$100,000.00 for a first conviction. If a corporate employer has already been convicted of an offence under the *ESA*, it can be fined up to \$250,000.00 for a second conviction. For a third conviction, the employer can be fined up to \$500,000.00.

Additional Information

better right or benefit

Any agreement that gives an employee a better right or benefit than the minimum standards that apply under the *ESA* will be the standard that applies to the employee.

waiver of rights

No employee can agree to waive or give up his or her rights under the *ESA* (for example, the right to receive overtime pay or public holiday pay). Any such agreement is null and void.

discounts

Discounts aren't covered by the *ESA*. The employer is responsible for deciding whether employees get a discount on products the employer makes or sells, or on services the employer provides. The employer is also the one who determines how much the discount will be.

dress codes

The employer is responsible for making decisions about dress codes, uniforms and other clothing requirements – and about who pays for them.

An employer may make a deduction from wages to cover the cost of a uniform or other clothing requirements with the signed, specific written authorization from the employee permitting the deduction and setting out the amount of the deduction.

However, a dress code can't violate a collective agreement at the workplace, the *Human Rights Code* or the *Occupational Health and Safety Act*.

sick leave and bereavement

The *ESA* now provides that employees in companies that regularly have 50 or more employees are entitled to emergency leaves in certain situations. (See "Emergency Leave" for details.) These are *unpaid* leaves of absence covering such things as personal illness, injury or medical emergency. They also include the death, illness, injury, medical emergency or other urgent matters involving a "relative," as listed in the *ESA*.

Some employers have *paid* plans for sickness, death and other leaves of absence. These plans aren't required by the *ESA*. An employer (or an employer and a union if there's a collective agreement) is able to decide what these plans will be. However, the rules about discrimination in benefit plans may apply to these plans. (See "Benefit Plans," for details.)

wrongful dismissal

The rules about termination and severance of employment are minimum requirements. An employee may choose instead to sue an employer in a court of law for "wrongful dismissal."

However, an employee can't sue an employer for wrongful dismissal and file a claim for termination or severance pay with the ministry for the same termination. The employee must choose one or the other. (See "Termination of Employment," for details.)

Need Help or More Information?

The ESA is a new piece of legislation and the Ministry of Labour will be providing additional information on the ESA and the regulations. Please check our website at www.gov.on.ca/lab/main.htm

For inquiries and general information about the ESA, call the Ministry of Labour's Employment Standards Information Centre at (416) 326-7160 in Toronto, or toll-free in Ontario at 1-800-531-5551.

You can also contact the centre by e-mail through the ministry website, at www.gov.on.ca/lab/mol/esmaile.htm

You can get information and other publications about the ESA from:

- Website – www.gov.on.ca/lab/main.htm
- Fax-on-Demand (416) 326-6546;
- Ministry of Labour Publications toll-free at 1-800-809-4731;
- Publications Ontario 880 Bay Street, 5th floor, Toronto M7A 1N8; telephone (416) 326-5300 or toll-free in Ontario at 1-800-668-9938; hearing impaired call 1-800-268-7095 (TTY);
- Publications Ontario On-Line
 - * <http://pubont.stores.gov.on.ca/pool/english>
 - * <http://pubont.stores.gov.on.ca/pool/french>

occupational health and safety inquiries

Telephone toll-free in Ontario at 1-800-268-8013 (province-wide).

For in-person, mail and fax inquiries, contact the Ministry of Labour office closest to you.

For e-mail inquiries, go to the ministry website at www.gov.on.ca/lab/mol/ohsmaile.htm

to file a complaint

Whenever possible, visit a Ministry of Labour office or a Government Information Centre *in person* to file a claim. Otherwise, mail your claim form to the nearest office of the Ministry of Labour.



Ministry of Labour Offices

northern region

Sudbury East & Sudbury West

159 Cedar Street
Suite 301
Sudbury, Ontario
P3E 6A5

Timmins

Government Complex
P. O. Bag 3050 "D" Wing
Highway 101 East
South Porcupine, Ontario
P0N 1H0

Thunder Bay

435 James Street South
Suite 222
Thunder Bay, Ontario
P7E 6S7

Sault Ste. Marie

70 Foster Drive
Suite 480
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P6A 6V4

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K2C 3T2

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K9J 8M5

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L8R 3J2

Halton

1 Jarvis Street
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Hamilton, Ontario
L8R 3J2

Brant

1 Jarvis Street
Main Floor
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L8R 3J2

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Schmon Place
301 St. Paul Street
8th Floor
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L2R 7R4

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London South

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